

2010

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Publication Information

25 Connecticut Journal of International Law 331 (2010)

Repository Citation

Winer, Anthony S., "An Escape Route from the Medellin Maze" (2010). *Faculty Scholarship*. Paper 377.
<http://open.mitchellhamline.edu/facsch/377>

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An Escape Route from the Medellin Maze

Abstract

Many in the United States who follow international law have tracked the course of the Supreme Court's 2008 Medellin case' especially closely, both before and after the Court's issuance of the decision. The case concerned the Vienna Convention on Consular Relations (the "Vienna Convention, "Convention" or "VCCR"), which imposes certain obligations on the authorities of a State Party when they imprison a national of another State Party. Among these duties is the obligation to inform the foreign prisoner that the Convention affords the prisoner the right to communicate, while in prison, with consular officials from the prisoner's home country. Authorities indicate that various states in the US have been lax in providing this information to incarcerated criminal defendants who are foreign nationals.

The Medellin decision, when read with other recent Supreme Court cases, creates a veritable "maze" of obstructions for any foreign national or any foreign sovereign who wants to obtain protection in US courts under the Vienna Convention. This article will refer to this set of obstructions as the "Medellin Maze." Any incarcerated defendant trying to secure the benefits of the Vienna Convention, or the home country of any such defendant, will need to analyze possible escape routes from the Medellin Maze. Sadly, and frustratingly, each of the possible escape routes that have thus far been explored by litigants leads to an impassible obstruction, or "Dead End," in the Maze. There is one possible course of action, however, that could well furnish a viable escape route from the Maze. The purpose of this article is to delineate the nature and extent of the obstructions, or Dead Ends, currently in place, and to describe this possible plan of escape from the Maze.

Keywords

Self-executing treaties, Treaty compliance

Disciplines

Criminal Procedure | International Law

AN ESCAPE ROUTE FROM THE *MEDELLÍN* MAZE

*Anthony S. Winer**

INTRODUCTION

Many in the United States who follow international law have tracked the course of the Supreme Court's 2008 *Medellín* case¹ especially closely, both before and after the Court's issuance of the decision. The case concerned the Vienna Convention on Consular Relations (the "Vienna Convention," "Convention" or "VCCR"),² which imposes certain obligations on the authorities of a State Party when they imprison a national of another State Party. Among these duties is the obligation to inform the foreign prisoner that the Convention affords the prisoner the right to communicate, while in prison, with consular officials from the prisoner's home country.³ Authorities indicate that various states in the US have been lax in providing this information to incarcerated criminal defendants who are foreign nationals.⁴

The major jurisprudential roots of the *Medellín* controversy can be traced to a 2004 judgment of the International Court of Justice ("ICJ").⁵ In that case, which involved fifty-two Mexican nationals imprisoned in Texas, the ICJ directed the US to take action to remedy violations of the VCCR provisions noted above.⁶ President George W. Bush subsequently issued a memorandum for the Attorney

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1. *Medellín v. Texas*, 552 U.S. 491 (2008).

2. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

3. See *id.* art. 36(1)(b) ("Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.").

4. For example, the judgment of the International Court of Justice ("ICJ") in *Avena and Other Mexican Nationals* (discussed below) cites nine US states that have, in recent years, collectively placed large numbers of Mexican criminal defendants on death row, allegedly without having complied with the requirements of the Vienna Convention. The *Avena* case cites these as being: California (twenty-eight cases), Texas (fifteen cases), Illinois (three cases), and Arizona, Arkansas, Nevada, Ohio, Oklahoma and Oregon (one case each). These cases took place between 1979 and 2004. See *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 24, ¶ 15 (Mar. 31).

5. *Id.*

6. *Id.* at 72, ¶ 153(9) (declaring that "the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to" in the Court's judgment).

General directing the Texas courts to abide by the judgment of the ICJ.⁷ But three years later, in *Medellin v. Texas*, the Supreme Court held that Texas courts were not required to comply with the judgment of the ICJ, or with the President's memorandum, when state law procedural limitations barred petitions to obtain such compliance.⁸ Accordingly, the Supreme Court's decision permitted Texas to execute José Ernesto Medellín, a convicted murderer who was a Mexican citizen, without having afforded him the protections of the Vienna Convention prior to his conviction.⁹

The *Medellin* decision, when read with other recent Supreme Court cases,¹⁰ creates a veritable "maze" of obstructions for any foreign national or any foreign sovereign who wants to obtain protection in US courts under the Vienna Convention. This article will refer to this set of obstructions as the "*Medellin* Maze." Any incarcerated defendant trying to secure the benefits of the Vienna Convention, or the home country of any such defendant, will need to analyze possible escape routes from the *Medellin* Maze. Sadly, and frustratingly, each of the possible escape routes that have thus far been explored by litigants leads to an impassible obstruction, or "Dead End," in the Maze. There is one possible course of action, however, that could well furnish a viable escape route from the Maze. The purpose of this article is to delineate the nature and extent of the obstructions, or Dead Ends, currently in place, and to describe this possible plan of escape from the Maze.

In so doing, this article is neither praising nor criticizing the Supreme Court's pronouncements in *Medellin* regarding broader jurisprudential issues. Such issues relate chiefly to the meaning of the phrase, "self-executing treaty,"¹¹ the limitations on presidential powers,¹² and the interpretation of the phrase "supreme Law of the

7. Memorandum from President George W. Bush to U.S. Atty. General (Feb. 28, 2005), *quoted in* *Medellin v. Texas*, 552 U.S. 491, 503 (2008) ("I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.").

8. *Medellin*, 552 U.S. at 498-49 ("We conclude that neither *Avena* nor the President's memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions.").

9. The ICJ noted Jose Ernesto Medellín's execution by the State of Texas on August 5, 2008 in a later judgment regarding a request for interpretation submitted to the ICJ by Mexico. Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals*, 2009 I.C.J. 139 at 4, *Avena and Other Mexican Nationals* (Mex. v. U.S.) 4, ¶ 6 (Req. for Interpretation of the Judgment) (order of Jan. 19, 2009).

10. These are principally *Beard v. Greene*, 523 U.S. 371 (1998) and *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These cases are both discussed in more detail, *infra* Part II.A.

11. *E.g.*, John T. Parry, *A Primer on Treaties and § 1983 After Medellin v. Texas*, 13 LEWIS & CLARK L. REV. 35, 61-63 (2009) (describing his view of the significance of self-executing status and its relationship with the availability of judicial enforcement of treaty rights by individuals); William M. Carter, Jr., *Treaties as Law and the Rule of Laws: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 347 (2010) (asserting that "non-self-executing treaties are federal law under the Supremacy Clause," notwithstanding their self-executing status).

12. *E.g.*, Ronald A. Brand, *Treaties and the Separation of Powers in the U.S.: A Reassessment After Medellin v. Texas* 18-20 (U.Pitt. Sch. of L. Research, Working Paper No. 2008-33, 2008)

Land” in Article VI, Clause 2 of the US Constitution.¹³ This article is not avoiding comment on the Supreme Court’s treatment of these issues because the issues are unimportant; on the contrary, these issues are very important. In spite of their importance, however, incarcerated foreign defendants and their home countries must now accept the Court’s interpretation of these broad jurisprudential issues as current doctrine. This article, in addressing the needs of such defendants and countries, must do so as well. This article will take these issues into account from the perspective of counsel for an incarcerated foreign defendant or such a defendant’s country. That is, this article will present the Court’s pronouncements on these issues as features of a maze through which a course must be safely charted. This maze must be negotiated in order to secure rights under the Vienna Convention for criminal defendants and their home countries.

This article takes the view that the parties best suited to secure the protection of foreign incarcerated defendants under the Vienna Convention are not the defendants themselves, but rather their home countries. It is widely believed that the Vienna Convention, unlike the United Nations (“UN”) documents at issue in the *Medellín* decision, is self-executing.¹⁴ It is thus broadly viewed as enforceable in US courts. Nevertheless, due to the intricacies of the doctrine of self-execution, sovereign states are better placed than the individual prisoners themselves to secure the protections that the Vienna Convention provides to prisoners.¹⁵ Furthermore, even sovereign states will not be able to obtain the Vienna Convention’s protections for the most unfortunate prisoners—those whose initial criminal prosecutions have already run their full course and who have exhausted all linear appeals. However, in each jurisdiction where such a foreign defendant has been denied the protections of the Vienna Convention, this article provides the home country of such defendant with a means of assuring that no further denials of that sort take place.

This article posits the use of an “Article 36 Injunction,” named for the provision of the Vienna Convention that requires the consular notice at issue in *Medellín*. This article will explain how and why a prisoner’s home state can obtain

available at <http://ssrn.com/abstract=1319818> (investigating the “weight” that courts should put on presidential determinations regarding the self-executing status of treaties); David J. Bederman, *Agora: Medellín: Medellín’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529 (2008).

13. E.g., Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 602 (2008) (asserting that the Supremacy Clause creates a presumption that treaties are self-executing, which can be overcome by a clear statement to the contrary); Curtis A. Bradley, *Self-Execution and Treaty Duality* 9 (Duke L. Sch. Publ. L. & Theory, Paper No. 239, 2009) available at <http://ssrn.com/abstract=1340651> (“The Supremacy clause does not by itself tell us the extent to which treaties should be judicially enforceable.”).

14. *Gandara v. Bennett*, 528 F.3d 823, 828 (11th Cir. 2008) (“The Vienna Convention is self-executing because it has the force of domestic law without Congress having to implement legislation.”); *Cornjeo v. County of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007) (“There is no question that the Vienna Convention is self-executing.”); *Jogi v. Voges*, 480 F.3d 822, 830 (7th Cir. 2007) (“[I]t is undisputed that the Convention [VCCR] is self-executing, meaning that legislative action was not necessary before it could be enforced.”); *Jogi v. Voges*, 425 F.3d 367, 378 (7th Cir. 2005) (“We . . . conclude that the Vienna Convention is a self-executing treaty.”), *withdrawn*, 480 F.3d 822, 824 (7th Cir. 2007).

15. See discussion *infra* Part IV.B.

a federal injunction against the authorities of any US jurisdiction that has denied Article 36 protections, thus prohibiting further denial of protections under the Convention.¹⁶ Such an injunction will avoid the restrictions of the Eleventh Amendment, and can thus have the broad, indefinite, and prospective effect of guaranteeing future compliance with the Vienna Convention in each enjoined jurisdiction.

A disadvantage of this approach is that it does not apply to current prisoners (including those on death row) who, having experienced their full trials and all linear appeals, have failed to raise the Vienna Convention issue.¹⁷ Prospective application, which is necessary to avoid the effects of the Eleventh Amendment, precludes the availability of the proffered injunction for these prisoners. The major focus of this article, however, is the continuing availability of international law, namely, the Vienna Convention protections under Article 36. The approach advanced in this article should be sufficiently useful in a broad variety of prospective cases, such that its inability to assist in these especially unfortunate cases should not detract from the significance of the approach.

In order to fully appreciate the basis of the Article 36 Injunction proposed in this article, it is necessary to be familiar with the Vienna Convention as a whole. Accordingly, Part I of this article begins with a description of the text and purposes of the Vienna Convention as an entire document. After an overview of the whole treaty, more particular attention is given to Article 36 and its relationship to the treaty in general.

Next, Part II of this article details the structure of the *Medellin* Maze. It will consider, in turn, each possible strategy that has been attempted by a foreign prisoner or home country to secure Article 36 protections, and each strategy that could be attempted in light of judicial and academic discussions up to this point. But even though there have been and could be many such strategies, the impact of the *Medellin* case, as well as other lines of federal case law, have erected substantial barriers to each of them. It will, thus, be shown that each of these strategies leads to a Dead End in the *Medellin* Maze.

16. See discussion *infra* Part IV.D.

17. The fact that many of the foreign prisoners in US detention whose VCCR rights have been denied were also death row inmates has been a significant element of the passion that has attached to these cases. See, e.g., Margaret E. McGuinness, *Three Narratives of Medellin v. Texas*, 31 SUFFOLK J. TRANSNAT'L L. REV. 227, 230, 243 (2008) (describing the Supreme Court's 2008 *Medellin* decision as "a rallying point for anti-death penalty activists around the world," and describing the use of VCCR noncompliance as a "norm portal" through which the death penalty can be attacked); Valerie Epps, *The Medellin v. Texas Symposium: A Case Worthy of Comment*, 31 SUFFOLK J. TRANSNAT'L L. REV. 209, 210 (2008) (remarking that "the happenstance of these cases [of VCCR violation] occurring in circumstances where the death penalty had been ordered has brought them a type of universal fame that certainly would not have adhered to regular treaty violation cases."); Christina M. Cerna, *The Right to Consular Notification as a Human Right*, 31 SUFFOLK TRANSNAT'L L. REV. 419, 438 (2008) (referring to a "frontal attack launched by Europe and Latin America against the continued imposition of the death penalty by the United States."). See generally William Schabas, *International Law, the United States of America and Capital Punishment*, 31 SUFFOLK TRANSNAT'L L. REV. 377 (2008) (describing the ways in which the death penalty affects the ICJ rulings on the US violation of the VCCR).

Some of these barriers have been clearly established by the Supreme Court or other federal courts in *Medellín* and other cases. These Dead Ends are impregnable. Other possible Dead Ends have not yet been definitively created as such by the Supreme Court, and strategies to circumvent them may technically remain available for prisoners, home countries, and others mindful of their interests. With respect to these potential strategies, this article takes the position that there are substantial, well-developed areas of federal constitutional law that are also likely to result in the erection of Dead Ends. This article does not denominate these strategies as Dead Ends out of a conviction that they are legally invalid. Rather, this article calls these strategies Dead Ends based on a strong suspicion that the federal courts (and the Supreme Court in particular) will erect doctrinal barriers against them in the future. This would be the case even if what academics would consider the “best” view of the relevant doctrines would not, in fact, result in a Dead End.

This article then returns to the Vienna Convention in Part III. This time, the review focuses on the precise provisions and formulations from the Vienna Convention’s text that lay the groundwork for the Article 36 Injunction. Finally, Part IV advocates use of the Injunction, and demonstrates why its issuance would be consistent with the Eleventh Amendment.

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS

The VCCR¹⁸ is one of the foundational documents of modern international relations. It is the framework convention that provides the legal medium through which consuls and consulates exercise their functions on a daily basis throughout the world.¹⁹ It does this principally by prescribing a broadly stated and somewhat lengthy set of consular functions²⁰ and an extensive list of consular privileges and immunities.²¹ The Convention includes intricate systems for facilitating these functions and protecting these privileges and immunities, described more fully

18. VCCR, *supra* note 2.

19. *E.g.*, CHARLES W. FREEMAN, JR., *THE DIPLOMAT’S DICTIONARY* 305 (U.S. Institute of Peace Press 1997) (1994) (“Vienna Convention on Consular Relations: A convention, dated 1963, that codified international practice with regard to consular privileges and immunities.”). In addition, one of the most widely available reference works on practical diplomacy bases its section entitled “Consular Officers and Consular Posts” almost exclusively on the text of the Convention. In the ten-page chapter, there are repeated explicit references to the Convention, and the discussion reflects the Convention’s provisions with almost slavish fidelity. *See* RALPH G. FELTHAM, *DIPLOMATIC HANDBOOK* 45-54 (8th ed. 2004); *see also* R.P. BARSTON, *MODERN DIPLOMACY* 341 (3d ed. 2006) (citing the Convention as “the relevant international agreement [] concerning the operation and functioning” of consulates).

20. Article 5 of the Convention is entitled “Consular Functions,” and contains thirteen subparagraphs delimiting such functions, usually in broad language. For example, sub-paragraph (a) lists as such a consular function, “protecting in the receiving State the interests of the sending State and its nationals, both individuals and bodies corporate, within the limits permitted by international law.”). VCCR, *supra* note 2, art. 5.

21. Chapter II of the Convention (Articles 28-57) lists and protects consular facilities, privileges and immunities. *Id.* ch. II, sec. I. These are further broken down into “Facilities, Privileges and Immunities Relating to the Consular Post,” *id.* ch. II, sec. I, and “Facilities, Privileges and Immunities Relating to Career Consular Officers and Other Members of a Consular Post.” *Id.* ch. II, sec. II.

below.²² In so doing, the Convention refers to any state that establishes a consular post in another state as a "sending State," and refers to any state in which a consular post is established by another state as a "receiving State."²³ Ambassadors and embassies represent the political interests of their sending States in receiving States, whereas consuls and consulates generally represent the interests of their domestic nationals when those nationals are present in receiving States.²⁴

In order to understand the intricacies of the *Medellin Maze*, it is first necessary to secure a somewhat intimate familiarity with the Convention and, in particular, Article 36. The next section will briefly review the Convention's general characteristics, some of the circumstances of its preparation, the precise text of Article 36, and the significance of that text for many of those most closely involved with its application.

A. *The General Features and Functions of the Convention*

The VCCR consists of seventy-five articles grouped into five chapters; in its original UN manuscript in double-spaced form, it is forty-five pages long.²⁵ Most of its provisions deal with the establishment and functioning of consular relations, or with the various privileges and immunities accorded to consular personnel.

For example, the VCCR prescribes a long list of "consular functions," most prominently including protecting the interests of nationals of the sending State in the receiving State,²⁶ furthering commercial and cultural relations between the sending State and the receiving State,²⁷ and issuing passports, visas and other transit documents to persons located in the receiving State.²⁸ The Convention also describes the procedures for, and consequences of, a declaration by a receiving State that a consular officer from a sending State is *persona non grata*.²⁹ Among its many other provisions detailing the mechanics of consular relations, the Convention assures freedom of movement and freedom of communication for consular officials,³⁰ and provides for the inviolability of consular premises, archives and documents.³¹ Among the privileges and immunities provided for in the

22. See *infra* Parts III.A.1 and III.A.2.

23. E.g., VCCR, *supra* note 2, art. 4(2) ("The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.").

24. See, e.g., Charles W. Freeman, *supra* note 19, at 54 ("A consul is an official agent sent by a state to reside in a foreign territory to assist and see to the protection of its nationals there."); *id.* at 55 ("Consulates are headed by consuls."); *id.* at 13 (defining an "Ambassador" as "[a] diplomatic agent of the highest rank, accredited to a foreign sovereign . . . as the resident representative of his own government . . ."); *id.* at 98 (defining an "Embassy" as "[t]he residence of an ambassador.").

25. The original manuscript form of the Convention can be found through consulting "Chapter III" of the "Status of Treaties" page at the website of the UN Treaty Collection. See United Nations Treaty Collection, <http://treaties.un.org>.

26. VCCR, *supra* note 2, art. 5(a).

27. *Id.* art. 5(b).

28. *Id.* art. 5(d).

29. *Id.* art. 23.

30. *Id.* arts. 34-35.

31. *Id.* arts. 31, 33.

Convention are a qualified immunity from arrest and detention for consular officers and employees.³² The Convention also generally protects consular officers and employees from the jurisdiction of the judicial and administrative authorities of the receiving State.³³ Consular officers and employees are also generally exempt under the Convention from requirements for residence permits, work permits, and social security compliance.³⁴ Consular premises and consular officers and employees are generally exempt from most taxes levied by the receiving State.³⁵

B. The International Law Commission as the Convention's Author

The VCCR was drafted under the auspices of the International Law Commission ("ILC") and ultimately signed in 1963.³⁶ The UN General Assembly created the ILC in 1948,³⁷ pursuant to the UN Charter's mandate to encourage "the progressive development of international law and its codification."³⁸ Accordingly, a significant portion of the ILC's work has consisted of preparing, for signature and ratification, draft multilateral treaties that codify previously existing international law from customary sources or more narrowly-based earlier treaties.

In the early years of the UN, the ILC turned its attention to codifying some of the most basic structures of international law, structures that had previously been chiefly within the realm of customary law. Among the ILC's earliest projects were the broadly-subscribed Treaty on the Continental Shelf,³⁹ signed in 1958, and related maritime treaties.⁴⁰

With the arrival of the 1960s, the ILC was preparing a set of draft treaties directed at diplomatic relations and other aspects of the relationships between states. The most prominent of these was probably the Vienna Convention on Diplomatic Relations ("VCDR"),⁴¹ signed in 1961. It was, and remains, the basic framework document setting forth the legal rules under which the activities of ambassadors, embassies and their staff are conducted. The VCCR followed, and then in 1969, another signal ILC achievement, the Vienna Convention on the Law of Treaties,⁴² was signed. The foundational character of all of these treaties was an

32. *Id.* art. 42.

33. *Id.* art. 43.

34. *Id.* arts. 46-48.

35. *Id.* arts. 49-50.

36. The history of the International Law Commission's ("ILCs") work through the various drafting stages of the VCCR is described at the ILC's website. See International Law Commission, <http://www.un.org/law/ilc> (the drafting history is found at the "Texts, instruments and final reports" page of the website).

37. G.A. Res. 174(II) (Nov. 21, 1947) (establishing the ILC and approving its Statute).

38. U.N. Charter, art. 13, ¶ (1)(a).

39. Convention on the Continental Shelf, Apr. 28, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

40. *E.g.*, Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

41. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, No. 7310, 500 U.N.T.S. 95 [hereinafter VCDR].

42. Vienna Convention on the Law of the Treaties, May 23, 1969, 1155 U.N.T.S. 331.

important stabilizing influence in view of the anxiety surrounding the height of the Cold War.

It is worthwhile to keep in mind the provenance of the VCCR within the ILC for at least two reasons. First, the fact that it was the ILC that developed the VCCR, and the fact that it did so early in the life of the ILC, emphasize the central and foundational character of the VCCR subject matter to modern international law. On the other hand, the VCCR's origin within the ILC also can be viewed as having a limiting effect on certain interpretational questions involving the VCCR. The work of the ILC has been almost exclusively focused on what might be called operational issues of international law among states. The ILC has done very little work regarding the development of international human rights law.⁴³ Many of the most foundational human rights documents have been developed through the General Assembly or specialized UN commissions, rather than the ILC.⁴⁴ Although this observation is not conclusive on any particular point, it is relevant to the issue—later addressed in this article⁴⁵—of whether the notice requirements of the VCCR set forth fundamental human rights that can be enforced individually by the prisoners involved.⁴⁶

C. *Article 36 of the Convention and Its Broadest Applications*

As previously noted, Article 36 of the VCCR contains the prisoner notification requirement central to the *Medellin* line of cases. Due to the impact of the *Medellin* litigation and its precursors, it is Article 36 that has attracted the most attention in recent years.⁴⁷ This identification of Article 36 with the fact pattern of cases like *Medellin* involving prisoners accused of serious violent crimes, often sitting on

43. The "Texts, instruments and final reports" page of the ILC website, *supra* note 36, lists the drafts, treaties and other documents prepared over the years by the ILC, arranged according to subject matter. In this list, there is no subject heading for "Human Rights," for example. The closest subject heading would be "Position of the individual in international law," and the only finished materials listed under that subject heading involve the Convention on the Reduction of Statelessness (1961).

44. For example, the Universal Declaration on Human Rights was initially proclaimed by the UN General Assembly, and the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") were initially developed by the UN Commission on Human Rights. *E.g.*, FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 2 (1990).

45. *See infra* Part II.C.

46. Some commentators have expressed skepticism as to whether these are indeed fundamental human rights. *See* Cerna, *supra* note 17, at 432 (noting the significance in this respect of the VCCR's failure to "require the [imprisoned] national's state to provide assistance to its national once it is informed of his/her detention in the host state."), at 433 (characterizing the posture of the Inter-American Court of Human Rights in this respect as "aggressive"), at 437 (noting again that the Inter-American Court did not "posit an obligation on the part of an alien's State of nationality to provide any assistance to the alien once it is contacted," and inquiring whether there could be a "human right" without "a corresponding State obligation"), at 453 (expressing the view that the ICJ "demurred" on the question in its *Avena* judgment) cited in note 5, *supra*.

47. For example, two of the most recent symposia devoted to the *Medellin* case and its ancillary issues appeared in the *American Journal of International Law* and the *Suffolk Transnational Law Journal*. *Symposium Agora: Medellin*, 102 AM. J. INT'L L. 529 (2008); *The Medellin v. Texas Symposium: A Case Worthy of Comment*, 31 SUFFOLK TRANSNAT'L L. REV. 209 (2008).

death row, has increased the urgency of the issues involved. However, it has also obscured the broader picture of the VCCR, and (to a degree) even Article 36 itself. Although Article 36 certainly applies to prisoners held in detention by foreign states, it also has broader applicability. Article 36 requirements are part of an extensive scheme of consular relations, integral to the conduct of modern international affairs. Some of the protections of Article 36 apply to all persons finding themselves in foreign jurisdictions, not just prisoners. Within paragraph 1 of Article 36, only the last two subparagraphs, (b) and (c), apply to prisoners. The first, subparagraph 1(a), protects all nationals of a State Party who find themselves within the jurisdiction of another State Party, in whatever context.

The full text of Article 36 is as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking an action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full

effect to be given to the purposes for which the rights accorded under this Article are intended.⁴⁸

The chief concern underlying Article 36 is the preservation of free communication within any receiving State between the consular post of any sending State and the sending State's nationals in the receiving State. This concern is most broadly expressed in subparagraph 1(a), which describes two correlative "rights" that the officials of any receiving State are required to observe. First, the consular officials of any sending State have the right to communicate with and have access to nationals of the sending State who find themselves within the receiving State. Second, and correlatively, sending State nationals have the right to communicate with and have access to consular officials of the sending State within any receiving State.⁴⁹

To anyone who has traveled in a foreign country, and who has been even minimally conscious of his or her circumstances while outside of their home country, the importance of subparagraph 1(a) should be self-evident.⁵⁰ The potential need for consular aid can arise for any traveler abroad, at virtually any time, for any number of reasons. For example, (i) a business person from the sending State may need assistance if licensing authorities from the receiving State are behaving in ways that are illegal and grossly unjust,⁵¹ (ii) a visiting sending State national who becomes physically incapacitated in the receiving State may need assistance in returning to the sending State,⁵² and (iii) visitors from the sending State may need assistance in dealing with last-minute changes to visa requirements imposed by the receiving State as they leave the receiving State.⁵³

48. VCCR, *supra* note 2, art. 36.

49. In both such cases, there is no specification or delimitation of any particular varieties of sending State nationals for whom it might be especially important to assure these communications and this access. This kind of protection is considered under subparagraph (a) to be important regarding all nationals of a given sending State within any receiving State, without any differentiation as to their circumstances. *Id.* art. 36(a).

50. When any person leaves his or her own home country, any protections afforded to that person by the constitution or laws of the home country are generally not opposable against officials of foreign states. Nationals of any state present in a state other than their own are, in general terms, completely subject to the jurisdiction of the officials of the foreign state. Differences in language, legal traditions and cultural norms can result in difficulties for anyone traveling outside his or her own home country. When these difficulties arise, the aid of an official representative from one's own home country, located in the foreign country where the problem has arisen, can prove indispensable.

51. Article 5, subparagraphs (b) and (c) of the VCCR list among consular functions "furthering the development of commercial, economic, cultural and scientific relations" and "ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State," respectively. VCCR, *supra* note 2, art. 5(b)-(c).

52. Article 5, subparagraph (h) of the VCCR lists among consular functions the "safeguarding [of] the interests of minors and other persons lacking full capacity who are nationals of the sending State." *Id.* art. 5(h).

53. Article 5, subparagraphs (d) and (e) of the VCCR list among consular functions "issuing passports and travel documents to nationals of the sending State" and "helping and assisting nationals . . . of the sending State," respectively. *Id.* art. 5(d)-(e).

Subparagraph 1(a) helps preserve the ability of consular officials and sending State nationals to contact each other through safeguarding their mutual ability to communicate with and have access to one another. Clearly, if a receiving State does not even permit consular officials and sending State nationals to communicate with and have access to one another, in contravention of subparagraph 1(a), the broader goals of the entire VCCR framework vis-à-vis that receiving State could be substantially impaired. In that event, the interests of the sending State's nationals in the receiving State would certainly suffer. However, it is important to realize that the interests of the sending State itself, as a sovereign entity, would also suffer. The residents of the sending State would see their government as being unable to protect them abroad, hence decreasing the legitimacy of the government and, in some cases, the state itself. The sending State also would be seen in the international community as unable to protect its nationals, thus decreasing its stature and potentially its trustworthiness in international relations. The ability of the sending State to conduct international relations could also be put into doubt, to the extent that its consular staff was shown to be undependable and ineffectual. For all these and many other reasons, a violation of subparagraph 1(a) could injure a sending State as much as, if not more than, its nationals.

D. Article 36 of the Convention and Its Impact on Prisoners

While subparagraph 1(a) has broad application to all sending State nationals located in receiving States, subparagraphs 1(b) and 1(c) are aimed specifically at sending State nationals who are arrested, imprisoned, in custody, or otherwise detained by the authorities of a receiving State. Nevertheless, in spite of their more specific application, these subparagraphs also raise precisely the same dignitary concerns for the sending State, as a sovereign entity, as are raised by subparagraph 1(a). If a receiving State denies the protections of subparagraphs 1(b) or 1(c), the interests of the sending State are impaired in the same ways as when subparagraph 1(a) is being violated. It is largely for this reason, no doubt, that the fact situations contemplated in these two subparagraphs appear in Article 36, immediately following subparagraph 1(a).

Subparagraph 1(b) sets forth two correlative sets of "rights" in these circumstances. On the one hand, the incarcerated sending State national has three rights as against the receiving State authorities. These are: (i) a right to require receiving State officials to inform the consular officials of the sending State of his or her arrest, imprisonment, custody or detention; (ii) the right to have the receiving State authorities forward any communications to the sending State consular post without delay; and (iii) the right to be informed by receiving State authorities, without delay, of the first two of these rights. On the other hand, the consular post has a correlative right, as constituted against the receiving State authorities. This is to receive without delay notification of the arrest, imprisonment, custody or other detention of any sending State national who has decided to exercise the first of the

above-described rights ascribed to him or her, and to have consular officials so notified.

Within the context of arrest, imprisonment, custody or detention, subparagraph 1(c) is a bit more general. It provides that consular officials generally have the right to visit a sending State national who is in prison or custody, to converse and correspond with any such national, and also to arrange for the legal representation of any such national.⁵⁴ Just as the general protections afforded by subparagraph 1(a) are obviously important to any and all foreign travelers, the protections of subparagraphs 1(b) and 1(c) are extremely important to those persons in a foreign country who find themselves incarcerated.⁵⁵ The importance of this interest is all the more compelling when one remembers that incarceration in a foreign country may not be the result of a wrongful act. Differences in language, legal traditions and cultural norms can cause misunderstandings that result in incarceration of various kinds, even when the incarcerated person is completely (or largely) blameless. Add to this those circumstances in which foreign authorities, or their nationals, may harbor a certain amount of ill will toward those from other states (or a particular other state), and one readily sees that this type of consular assistance is of paramount importance to anyone incarcerated in a foreign country. It should be clear that subparagraphs 1(b) and 1(c) of Article 36 help assure the availability of this assistance in these circumstances.

In this connection, it is worthwhile to address an aspect of the *Medellín* case emphasized by the Supreme Court. The Supreme Court majority goes a certain distance out of its way to describe in grisly detail the violent crime of which Medellín was convicted.⁵⁶ Such a recounting is, of course, not strictly necessary for

54. They only have this right, however, if the sending State national who is arrested, imprisoned, in custody or detained does not expressly oppose such actions on their part. *Id.* art. 36(1)(c).

55. Being incarcerated in a foreign country, again with differences in language, customs and legal systems, is a distressing situation to say the least. One may be legitimately suspected of a serious crime in the foreign country, and the incarceration may in fact be objectively justifiable. But that does not reduce the importance of access to (and communication with) officials of one's home consulate. Even if one has in fact committed a serious crime, the general world consensus is that one should have fully adequate legal representation. And for foreign nationals incarcerated by states other than their own, fully adequate representation is very likely to include the involvement of one's home consulate.

56. In Part I.B of its opinion, the Court provides the following details:

Petitioner Jose Ernesto Medellín, a Mexican national, has lived in the United States since preschool. A member of the 'Black and Whites' gang, Medellín was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers.

On June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena were walking home when they encountered Medellín and several fellow gang members. Medellín attempted to engage Elizabeth in conversation. When she tried to run, petitioner threw her to the ground. Jennifer was grabbed by other gang members when she, in response to her friend's cries, ran back to help. The gang members raped both girls for over an hour. Then, to prevent their victims from identifying them, Medellín and his fellow gang members murdered the girls and discarded their bodies in a wooded area. Medellín was personally responsible for strangling at least one of the girls with her own shoelace.

Medellín was arrested at approximately 4 a.m. on June 29, 1993. A few hours later, between 5:54 and 7:23 a.m., Medellín was given Miranda warnings; he then signed a written waiver and gave a detailed written confession.

Medellín v. Texas, 552 U.S. 491, 501-02 (2008).

any of the legal points the majority makes in its opinion. However, the rhetorical function of the graphic description is obvious. The Court majority is attaching implicit importance to the fact that Medellín committed a heinously violent and vicious act; they are indicating that there is no question that he is guilty. Those who argue his cause in the name of international law, the Court's rhetoric implies, are doing so in the unmerited service of a ghastly man who has committed a ghastly crime.

It is worth pointing out that when US nationals find themselves incarcerated abroad, they might themselves be accused and convicted of crimes that, according to local mores, may be horrific indeed.⁵⁷ Sometimes crimes might seem comparatively less atrocious to US nationals than they do to the nationals of other countries. A principal reason that activists and commentators care so much about the treatment of Medellín is that his poor treatment by the US could provide a reciprocal license to foreign governments to similarly mistreat US detainees within their own borders. That is, the more casually the US treats VCCR protections of detained foreign nationals, the less confident US citizens and officials can be that the Convention's protections will be afforded to them abroad.

It is not a sufficient answer to say that the US may only be casual about VCCR protections for the most ghastly criminals because comparatively less harmful acts (in the eyes of Americans) may be considered to be similarly ghastly when committed by US nationals in other countries. This is all the more true when a US national has not committed what US law considers a crime, or is being held on potentially trumped-up charges created to mask a political imprisonment. Governments holding foreign prisoners for political reasons may be more likely to charge them, as an official matter, with crimes that are especially heinous.⁵⁸ It makes no difference that the charges are transparently false. The mere fact that US states can deny VCCR protections with impunity in the case of particularly heinous crimes provides all the "cover" that is necessary for nefarious governments to do the same to US nationals, whether or not there are any bases to the charges.

57. See, e.g., McGuinness, *supra* note 17, at 244-45 ("Consular protection can mean the difference between fair process, some process, and no process. In places with less developed rule of law traditions, where international human rights regimes have largely failed to make a difference in individual cases, political intervention on behalf of co-nationals can be a more effective means of protecting individual rights. Indeed, this fact is the premise on which the VCCR notification is based.").

58. An example here would be Libya's treatment of the Palestinian and Bulgarian medical professionals accused of intentionally transmitting HIV to Libyan infants, when in all likelihood the infections took place in the context of inadequate sanitation in Libyan facilities. Rather than admit that his own government was inadequately protective of its own citizens, Colonel Muammar al-Gaddafi charged the foreigners with a heinous crime for political reasons. There is no good reason to suppose that the tendency to imprison foreigners for political reasons would be any less marked when the foreigners are US nationals than when they are Palestinians or Bulgarians. If anything, their desirability as political foils may often be greater. See, e.g., *Libya-Jailed Bulgarian Nurses, Palestinian Plead Innocent*, NOVINITE, Feb. 27, 2007, http://www.novinite.com/view_news.php?id=77142.

E. Individual Enforceability Under Article 36

The text of Article 36 refers to the "right" of sending State nationals to protection under its terms. And, indeed, the discussion up to this point has, on occasion, referenced a foreign prisoner's "right" or "rights" under the VCCR. However, use of the word "right" in this connection is arguably problematic. The frequency with which this linguistic usage has arisen in the discussion so far, and with which it will arise going forward, makes necessary a brief discussion of the interpretative problems it raises.

In the context of international treaties, "rights" of nationals of the contracting states are often referenced when the nationals do not themselves have such "rights," as that term might be used in the context of domestic law. Some lower federal courts have used the example of a fishing treaty between the US and other states,⁵⁹ which may refer to "rights" of the individuals in each country's fishing industry to fish in the waters of the other. Such a treaty might use the word "right," but it would not ordinarily connote the ability of the individuals in the industry to sue the foreign state if it behaved contrary to the treaty. In the event of a violation by one state or the other, the members of the fishing industry in the wronged state would normally complain to their domestic authorities, who would then address the authorities of the offending state for violating the "rights" of the members of its fishing industry.⁶⁰

Other examples are presented in various human rights conventions, such as the International Covenant on Civil and Political Rights ("ICCPR")⁶¹ and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),⁶² which detail specified "rights" of individuals under them, but do not require that each State Party to the convention stand ready to enforce those rights under the State Party's standard domestic judicial procedures. These conventions themselves create committees that monitor compliance and attempt to address enforcement in that way.⁶³ It is not a necessary feature of either convention that any State Party

59. *E.g.*, *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 n. 3 (5th Cir. 2001) ("Even where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that . . . individual rights are only derivative through the States.") (quoting *U.S. v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975)).

60. *Id.*

61. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

62. International Convention on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

63. Under the ICCPR, States Parties submit reports on adopted measures fulfilling their duties giving effect to the Covenant. ICCPR, *supra* note 61, art. 40(1). States Parties submit the reports to the UN Secretary-General (*Id.* art. 40(2)), who transmits them to the Human Rights Committee established pursuant to ICCPR Article 28. A State Party may, under specified circumstances, report to the Committee the failure of another State Party to fulfill their obligations under the ICCPR. *Id.* art. 41(1). In general, the Committee will ascertain that all available domestic remedies have been exhausted before it will deal with any asserted failure of compliance. *Id.* art. 41(1)(c). The Committee holds closed meetings when examining communications regarding such matters. *Id.* art. 41(1)(d). The Committee is generally required to issue a report to the States Parties concerned within twelve months. *Id.* art. 41(h).

afford domestic relief through domestic judicial action. And yet both conventions make liberal use of the word “right.”⁶⁴

There is a substantial question in the context of Article 36 as to whether the rights it mentions must be directly enforceable by individuals in domestic courts. While this question will be addressed in more detail in Part II.C of this article, at this point, various observations are in order. The substantial majority of US circuit courts of appeal that have addressed this question have answered it in the negative.⁶⁵ On the other hand, the ICJ and the Inter-American Court of Human Rights have answered the question in the affirmative.⁶⁶ Similarly, there is no shortage of academic commentary arguing that Article 36 rights must be

Under the ICESCR, State Parties submit reports on the measures they have adopted and progress they have made in achieving the observance of the rights recognized in the Covenant. ICESCR, *supra* note 62, art.16(1). States Parties submit these reports to the UN Secretary-General who transmits them to the Economic and Social Council. *Id.* art. 16(2)(a). The Economic and Security Council may bring to the attention of other UN organs and agencies any matters arising out of such reports that may assist such other bodies in deciding on international measures likely to contribute to the progressive implementation of the Covenant. *Id.* art. 22. States Parties agree to certain international actions for the achievement of the rights recognized in the Covenant. *Id.* art. 23.

Under the Optional Protocol to the ICESCR (“Optional Protocol to ICESCR”), the Committee on Economic, Social and Cultural Rights of the UN Economic and Social Council (the “Committee”) assumes certain duties under the ICESCR. For example, under the Protocol, communications may be submitted to the Committee by or on behalf of individuals or groups of individuals under the jurisdiction of a State Party, claiming to be victims of a violation of the ICESCR. *See* Optional Protocol to the ICESCR, art. 2, G.A. Res. 63/117 U.N. Doc. A/Res/63/117 (Dec. 10, 2008). Communications will not be admissible unless all available domestic remedies have been exhausted. *Id.* art. 3(1). The Committee may recommend necessary interim measures to avoid possible irreparable damage to victims. *Id.* art. 5. The Optional Protocol also outlines procedures for the friendly settlement of matters arising under the ICESCR and the Optional Protocol. *Id.* art. 7. The Optional Protocol also provides the Committee with authority similar to that of the ICCPR Human Rights Committee with respect to reported violations of the ICESCR. *Id.* arts. 10-13.

64. It may well be that courts in some (or many) countries refer to, or even enforce, certain provisions of these or other similar treaties. They may also be enforced by certain multilateral tribunals. The point being made, however, is that neither the ICCPR nor the ICESCR *requires* that their provisions be judicially enforceable by individuals in domestic courts.

65. *See, e.g.,* Gandara v. Bennett, 528 F.3d 823, 828 (11th Cir. 2008) (“The [VCCR] Treaty simply fails to confer individual rights that may be judicially enforced.”); Cornjeo v. County of San Diego, 504 F.3d 853, 863 (9th Cir. 2007) (“Accordingly, we hold that Article 36 does not unambiguously give Comejo a privately enforceable right.”); Medellin v. Texas Dept. of Crim. Justice, 371 F.3d 270, 280 (5th Cir. 2004) (“We are bound to apply this holding, [that Article 36 of the Vienna Convention does not create an individually enforceable right].”); *U.S. v. Jimenez Nava*, 243 F.3d 192, 198 (5th Cir. 2001) (“The sum of Jimenez-Nava’s arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained foreign national and his consular office.”). *Contrast:* Jogi v. Voges, 480 F.3d 822, 835 (7th Cir. 2007) (“Article 36 of the Vienna Convention by its terms grants private rights to an identifiable class of persons . . . from countries . . . parties to the Convention who are in the United States.”); Jogi v. Voges, 425 F.3d 367, 382 (7th Cir. 2005), *withdrawn*, 480 F.3d 822, 834 (7th Cir. 2007) (“Article 36 confers individual rights on detained nationals.”).

66. *LaGrand* (F.R.G. v. U.S.) 2001 I.C.J. 466, 494, ¶ 77 (June 27) (“[T]he Court concludes that Article 36, paragraph 1, creates individual rights.”); *Avena*, *supra* note 4, at 36, ¶ 40 (referencing this statement in *LaGrand*); *Right to Information on Consular Assistance in the Framework of Guarantees of Due Process of Law*, Advisory Opinion, (Inter-Am. Ct. of H. R. OC-16/99), 50, ¶ 84 (Oct. 1, 1999) (concluding that Article 36 of the VCCR “endows a detained foreign national with individual rights that are the counterpart to the host State’s correlative duties.”).

individually enforceable.⁶⁷ Meanwhile, the Supreme Court has repeatedly, and explicitly, left the question undecided.⁶⁸

The question is arguable from both sides, but it is most likely that the federal courts, having taken note of the ongoing construction of the *Medellin* Maze, will not let this possibility grow into a useful escape route. This is primarily because the arguments against individual enforcement of rights under Article 36 are substantial. Furthermore, federal district courts and circuit courts of appeal have witnessed the way in which the Supreme Court has treated Article 36 over the last eleven years. The only circuit court to find in favor of judicially enforceable individual rights under Article 36 is the Seventh Circuit.⁶⁹ The Seventh Circuit did so in two successive hearings of the same case, the first of which occurred before the last two Supreme Court rulings in this area. As shown later in this article,⁷⁰ most federal courts are not apt to interpret the highly debatable individual enforceability of Article 36 in a way that is helpful to the types of defendants that have been raising the issue. However, the question of judicial enforcement by individuals is only one issue forming one part of the *Medellin* Maze. Accordingly, this article now turns to examine each component of this Maze.

II. A GUIDED TOUR THROUGH THE MEDELLÍN MAZE

As indicated above, Jose Ernesto Medellín was a Mexican citizen living in the US who was convicted of a capital crime in Texas.⁷¹ When his case was included in the international arguments before the ICJ, fifty-one other non-US citizens were

67. Jordan J. Paust, Medellín, Avena, *The Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 306 n.16 (2008) ("I agree with the ICJ, the Inter-American Court of Human Rights, and others that individuals have rights under the Convention."); Cerna, *supra* note 17, at 419 (quoting Joan Fitzpatrick, the *Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427, 427-33, to indicate Fitzpatrick's view that "consular access is an individual right").

68. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (asserting that the VCCR "arguably confers on an individual the right to consular assistance following arrest"); *Sanchez-Llamas v. Oregon*, 548 U.S. 343, 343 (2006) (declaring it "unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights," and that "we assume, without deciding, that Article 36 does grant . . . such rights"); *Medellin v. Texas*, 552 U.S. 491, 506 (2008) (showing that the Court "assumes without deciding" that "Article 36 grants foreign nationals 'an individually enforceable right to request that their consular officers be notified of their detention'").

69. In that case, an Indian national brought an action against law enforcement officials alleging violation of Article 36 of the Vienna Convention on Consular Relations. The court held that the Vienna Convention was self-executing and conferred individually enforceable rights. See *Jogi v. Voges*, 480 F.3d 822, 822 (7th Cir. 2007). This was after an earlier decision of the same case, to broadly the same effect. *Jogi v. Voges*, 425 F.3d 367, 367 (7th Cir. 2005). The Seventh Circuit rendered its first opinion prior to the Supreme Court ruling in *Sanchez-Llamas*, and so withdrew its first opinion before issuing the second opinion, post-*Sanchez-Llamas*, nevertheless reaching the same result. 480 F.3d at 824. The Seventh Circuit's second opinion was rendered prior to the Supreme Court's ruling in *Medellin*.

70. See discussion *infra* Part II.C.

71. Sometimes, commentators are sensitive to the use of private parties' names in developing lengthy discussions on legal doctrine. However, in view of the circumstances of this case, this is not a material concern. This discussion will refer to the *Medellin* litigation, and the veritable maze that it has constructed, through the use of the defendant's name.

also included as death row inmates that were the subjects of the litigation.⁷² Medellín has since been executed. Most of the rest of these inmates presumably remain on death row. In addition, it is eminently foreseeable that many other foreign nationals will become incarcerated by state governments within the US in the future. The issues litigated in the Supreme Court's *Medellín* decision will have an impact on many of them as well. Indeed, it is these future inmates to whom the analysis in this article is primarily directed.

A. *Timing Difficulties for Many Inhabitants of the Medellín Maze*

The death row inmates like Medellín who found themselves the focus of the VCCR Article 36 issue were all convicted of violent crimes without having been adequately informed of their rights under Article 36. In most cases, the receiving State authorities did not notify the sending State consulates of their foreign national's incarceration. The Supreme Court has acknowledged that both the failures to inform and the failures to notify are violations of Article 36.⁷³

Most commentators do not claim that if Medellín and the other death row inmates in his position had been afforded timely compliance with Article 36, they would have been found innocent of their crimes. Rather, the intimation is that, at least in some cases, adequate assistance by consular officials might have resulted in more effective representation in court and possibly avoidance of the death penalty.⁷⁴ Such a concern is, of course, highly conjectural. Even if a death sentence was not avoided, advocates appear to believe that a procedure which provides a defendant all the assistance to which he or she is legally entitled is preferable to one in which the defendant is not given such protection.⁷⁵ One need only recall the discussion in

72. E.g., *Avena and Other Mexican Nationals*, *supra* note 4, at 25 (listing Medellín among fifty-two Mexican nationals initially so affected).

73. In *Medellín*, for example, the Supreme Court refers to the withholding of Medellín's rights under the VCCR: "Local law enforcement officers did not . . . inform Medellín of his Vienna Convention right to notify the Mexican consulate of his detention." *Medellín*, 552 U.S. at 501 (emphasis added). In a subsequent footnote, the Court also references state notification obligations under VCCR Article 36(1)(b), and then concludes that, in light of the ultimate disposition, the Court "need not consider whether Medellín was prejudiced in any way by the violation of his Vienna Convention rights." *Id.* at 1355 n.1 (emphasis added). In *Sanchez-Llamas*, the Court also describes the facts in ways that seem to acknowledge that rights under the VCCR were violated. In describing the police arrest of the Oregon defendant in that decision, *Sanchez-Llamas*, the Court notes that "at no time . . . did they inform him that he could ask to have the Mexican Consulate notified of his detention." *Sanchez-Llamas*, 548 U.S. at 340. And then, in describing the detention of the Virginia defendant Bustillo, the Court notes that "[a]uthorities never informed him that he could request to have the Honduran consulate notified of his detention." *Id.* at 341.

74. The Supreme Court has averted to this argument in the context of *Breard*, 523 U.S. at 377 ("Breard's asserted prejudice—that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject . . .").

75. Many commentators have noted the connection between the Article 36 issue and the death penalty. See *supra*, note 17. Presumably, at least some advocates for those asserting Article 36 rights would engage in Article 36 arguments even if a death penalty were all but inevitable, and the rationale cited in the text would seem to be among the most prominent reasons for doing so.

the first part of this article regarding the predicament of a US traveler incarcerated in a foreign country not known for procedural fairness to appreciate this point.⁷⁶

One of the major problems that litigating inmates have had in complaining about Article 36 violations has been timing. Unfortunately for Medellín and many of the other inmates, the defense attorneys working on their cases did not complain about the Article 36 violation until it was too late.⁷⁷ In many states, "procedural default" rules prevent a defendant from pursuing collateral relief on the basis of arguments that were not made during trial or on direct appeal. These kinds of procedural default rules have wreaked havoc on defendants who have been denied their Article 36 protections. In Medellín's case, for example, he had gone through a complete set of state trial court and state appellate court proceedings without any of his attorneys raising the issue; the issue did not arise until state habeas corpus proceedings were instituted on his behalf.⁷⁸ The state courts then deployed the procedural default rule to estop the further development of his Article 36 claim.⁷⁹ These procedural default rules can make it almost impossible for current death row inmates to obtain relief on the basis of Article 36.

In the course of the last eleven years, the Supreme Court has shown itself broadly unreceptive to foreign prisoners whose Article 36 claims have been frustrated by procedural default rules, while the ICJ has been more sympathetic. For its part, the ICJ has issued two final judgments addressing this issue, both finding that Article 36 precludes its frustration by domestic procedural bar rules.⁸⁰ The *Medellín* decision was in fact the third Supreme Court ruling allowing state procedural bar rules to trump Article 36 claims.

The first of three Article 36 cases decided by the Supreme Court was *Breard v. Greene* in 1998,⁸¹ discussed in more detail in Part II.G, below. In *Breard*, for a variety of reasons, the Court determined that state procedural default rules could effectively preclude relief resulting from Article 36 violations. One year later, the ICJ issued its judgment in the *LaGrand* case,⁸² determining that State Parties to the

76. See *supra* text and notes at n.49-53.

77. In *Medellín*, for example, the Supreme Court noted that "Medellín first raised his Vienna Convention claim in his first application for state post-conviction relief. The state trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review." *Medellín*, 552 U.S. at 501. Similarly, in *Sanchez-Llamas*, the Court noted an analogous delay for the Virginia defendant in that decision, Bustillo. "After his conviction became final, Bustillo filed a petition for a writ of habeas corpus in state court. There, for the first time, he argued that authorities had violated his right to consular notification under Article 36 of the Vienna Convention." *Sanchez-Llamas*, 548 U.S. at 341.

78. *Medellín*, 552 U.S. at 501 ("The State trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review.").

79. *Id.* at 502 (indicating affirmance by the Texas Court of Criminal Appeals).

80. See *infra* text and notes 82-90.

81. *Breard*, 523 U.S. at 371.

82. *Germany v. United States*, 2001 I.C.J. 466 (June 27) [hereinafter *LaGrand*]. The *La Grand* case involved two brothers who, although born in Germany, had been moved to the US as young children. They had returned to Germany once for six months during young adulthood, but otherwise had remained in the US as the adopted children of a US national. The US maintained that neither was known to have spoken German, but it was clear that they at all times retained their German nationality. As adults, they were both tried and convicted of first degree murder in Arizona state courts, and then

VCCR may not allow procedural default rules to preclude relief after the Convention's terms have been violated under Article 36.⁸³ The ICJ seemed particularly perturbed that the inmates' delays in presenting their claims of violation seemed largely to have been the result of the government's own failure to inform inmates of the Article's protections.⁸⁴ The one surviving inmate at issue in the *LaGrand* case had actually been executed by state authorities more than two years before the issuance of the ICJ judgment. The sending State authorities had decided to pursue the ICJ proceedings until final judgment even though both prisoners by then had been executed.⁸⁵

About eighteen months after the ICJ handed down its *LeGrand* judgment, Mexico commenced proceedings in the ICJ with respect to fifty-two of its nationals on death row in various states of the US. Although nothing had occurred in the interim to have disturbed the *LaGrand* judgment, Mexico was no doubt attempting to obtain a judgment of the ICJ that would have specifically applied to its own nationals on death row in the US.⁸⁶ In 2004, the ICJ ultimately ruled in Mexico's favor in its judgment entitled *Avena and Other Mexican Nationals*.⁸⁷ The ICJ reiterated its conclusion in *LaGrand* that Article 36 precludes its frustration through domestic procedural default rules.⁸⁸

Two years after the *Avena* judgment, the Supreme Court again addressed Article 36 claims in *Sanchez-Llamas v. United States*.⁸⁹ This case involved two non-US nationals sentenced to lengthy prison terms in US state courts. Sanchez-Llamas was a Mexican national, convicted in Oregon, while the second defendant,

sentenced to death. At no time prior to their conviction were their rights under the VCCR observed. See *id.* at 474-75, ¶¶ 13-15. The procedural default rule was used as a basis for denying their federal habeas corpus petitions, which were based in part on the state's failure to observe VCCR Article 36. See *id.* at 477, ¶ 23.

83. *Id.* at 497-98, ¶ 91 ("Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36.").

84. *Id.* (emphasizing that it was "because of the failure of the American authorities to comply with their obligation under Article 36" that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds"). This element of irritation was also presented in the *Avena* judgment, when the ICJ complained, "it has been the failure of the United States itself to inform [foreign prisoners] that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Mexico v. United States*, 2004 I.C.J. 12, 57, ¶ 113 (Mar. 31).

85. See, e.g., John F. Murphy, *Medellín v. Texas: Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs*, 31 SUFFOLK TRANSNAT'L L. REV. 247, 258-59 (2008) (describing the timing of these events, and contrasting Germany's decision in *LaGrand* with that of Paraguay in *Breard*).

86. Article 59 of the ICJ Statute states that each decision of the ICJ "has no binding force except between the parties and in respect of that particular case." Accordingly, Mexico might not have been able to strongly rely solely on the *LaGrand* judgment for the proposition that an earlier ICJ judgment had directly prohibited the execution of its nationals.

87. *Mexico v. U.S.*, 2004 I.C.J. 12 (March 31). Mexico's initial filing in the case was made on January 9, 2003, while the *LaGrand* judgment is dated June 27, 2001. *Id.* at 17, ¶ 1.

88. 2004 I.C.J. at 56-57, ¶ 112 (quoting the ICJ's determination in *LaGrand*, and confirming that "[t]his statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.").

89. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

Bustillo, was a Honduran national convicted in Virginia. Even though Sanchez-Llamas was a Mexican national, the ICJ *Avena* judgment did not apply directly to him because he was not one of the death row inmates expressly covered by Mexico's action in *Avena*. Once again, the procedural default issue arose because Bustillo had not raised his Article 36 claim until after his conviction had run its course through Virginia trial and appellate courts and become final. The Supreme Court acknowledged the *LaGrand* and *Avena* rulings,⁹⁰ but nevertheless held again that state procedural default rules could trump protections under Article 36.

It was two years after the Supreme Court's ruling in *Sanchez-Llamas* that one of the Mexican detainees covered by the ICJ's *Avena* judgment was granted certiorari by the Supreme Court. That was *Medellin*, and as noted above, the Supreme Court decided for the third time that state procedural default rules could block relief under Article 36. This time, however, the Supreme Court's ruling was in direct contravention of an ICJ judgment that applied to the specific defendant before the Supreme Court.

B. Procedural Defaults as a "Dead End" in the Maze for Tardy Defendants

In addressing the effect of procedural default rules on Article 36 protections, the best place to start is the text of Article 36 itself. As noted earlier, paragraph 2 of Article 36 provides that:

The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.⁹¹

On one hand, this clause supports the argument that procedural bar rules can trump Article 36 rights to the extent that they affirm that the rights "shall be exercised in conformity with the laws and regulations of the receiving State." On the other hand, the clause can be read to negate that effect to the extent that the procedural bar rules would not "enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

In its three Article 36 opinions, the Supreme Court has given primary weight to the first part of paragraph 2, the provision affirming that Article 36 rights shall be exercised in conformity with the laws and regulations of the receiving State.⁹² The Court has simply not given effect to the second part of paragraph 2. In *Breard*, the Court merely recited the first part of paragraph 2, and asserted its availability

90. *Id.* at 352 ("[Bustillo] argues that since *Breard*, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims.").

91. VCCR, art. 36(2).

92. The Court has also maintained that, even apart from paragraph 2 of Article 36, "the procedural rules of domestic law generally govern the implementation of an international treaty." *Sanchez-Llamas*, 548 U.S. at 356 (citing *Breard*, 523 U.S. at 375).

for allowing procedural bars to trump Article 36.⁹³ Rather than moving on to the second part of paragraph 2, the Court instead noted the effects of the “last-in-time-is-best-in-right” rule governing the domestic legal relationship in the US between treaty provisions and federal statutes. The Court viewed the passage of the Antiterrorism and Effective Death Penalty Act in 1996 as an intervening statute that would supersede any residual protection afforded by paragraph 2.⁹⁴

In *Sanchez-Llamas*, the Court reiterated *Breard*’s reliance on the first part of paragraph 2, and then dealt with the second part by providing a somewhat detailed description of the importance of procedural default rules in adversary judicial systems.⁹⁵ In *Medellín*, the Court did not directly address paragraph 2 at all.⁹⁶

By contrast, the ICJ has given substantial weight to the second part of paragraph 2 in its two Article 36 final judgments. In *LaGrand*, the ICJ criticized the application of a procedural default rule to trump Article 36 protections. The ICJ first allowed that, in itself, “the rule does not violate Article 36 of the Vienna Convention.”⁹⁷ However, the ICJ noted that, by the time Germany was made aware of the LaGrands’ situation and was able to provide some assistance to them, “because of the failure of the American authorities to comply with their obligation under Article 36, the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on US constitutional grounds.”⁹⁸ Accordingly, the ICJ concluded that, “[u]nder these circumstances, the procedural default rule had the effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended,’ and thus violated paragraph 2 of Article 36.”⁹⁹

In its 2004 *Avena* judgment, the ICJ quoted from that section of the *LaGrand* judgment, and then noted that:

93. *Breard*, 523 U.S. at 375-76 (“By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna convention in conformity with the laws of the United States and the Commonwealth of Virginia.”).

94. *Id.* at 376 (“[I]n 1996, . . . Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) Breard’s ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him.”).

95. *Sanchez-Llamas*, 548 U.S. at 356 (“This reasoning [that procedural default rules fail to give ‘full effect’ to the purposes of Article 36 contrary to its terms] overlooks the importance of procedural default rules in an adversary system . . .”).

96. In *Medellín*, the Court states, “we reiterated in *Sanchez-Llamas* what we held in *Breard*, that ‘absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.’” *Medellín v. Texas*, 552 U.S. 491, 517 (2008) (citing *Sanchez-Llamas*, 548 U.S. at 351; *Breard*, 523 U.S. at 375). This statement, however, goes to the general rule of interpretation that the Court there asserted, rather than to the text-based analysis of paragraph 2. The Court next contends that, “there is no statement in the Optional Protocol, the UN Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules.” *Id.* Finally, the Court expresses alarm at “the consequences of *Medellín*’s argument,” asserting that under his argument an ICJ judgment “is not only binding domestic law but is also unassailable.” This assertion by the Court addresses the scope of ICJ authority rather than the meaning of paragraph 2.

97. *LaGrand*, 2001 I.C.J. at 497.

98. *Id.*

99. *Id.* at 498.

[T]he procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.¹⁰⁰

The ICJ thus determined that, “the procedural default rule may continue to prevent courts from attaching legal significance to the . . . violation of the rights set forth in Article 36.”¹⁰¹ Since, unlike the situation in *LaGrand*, most of the *Avena* detainees had not yet progressed to the stage where “there was no further possibility of judicial re-examination,” the ICJ decided it would be “premature” to conclude that violations of Article 36, paragraph 2 had already occurred in those cases.¹⁰² It is understandable that the ICJ would take this position. The second part of paragraph 2 of Article 36 certainly limits the application of the laws and regulations of the receiving State to those laws and regulations that do not impair the full effect of the rights accorded under that Article. And procedural default rules, by precluding the assertion of those rights, do tend to impair the full effect of the Article’s provisions granting those rights.

However, the Supreme Court has spoken on this point, and the procedural default rules seem to be squarely supported in its *Breard* opinion. The Court points out that state procedural default rules can preclude the assertion of constitutional rights under the US Constitution, and asserts that it would be anomalous to allow preclusion of the assertion of constitutional rights, but not allow preclusion of rights under treaties.¹⁰³ As noted above, the Court seems to claim that procedural default rules are founded in the fundamental notion of an adversary system of justice that “relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication.”¹⁰⁴ The Court thus seems to be arguing that adherence to procedural default rules is critical to the effective operation of an adversarial system of justice. Among other things, the implication seems to be that procedural default rules prevent counsel from purposely “squirreling away” arguments in abeyance. Absent a procedural bar rule, defense counsel could surreptitiously reserve each successive argument solely for later proceedings. The concern would be that counsel could conceivably bring up each new argument in a new proceeding, only after adverse determinations against previously stated arguments in earlier proceedings. This would appear to be inherent in the Court’s explanation that the “consequence of

100. *Avena*, *supra* note 4, at 57.

101. *Id.*

102. *Id.*

103. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (“[A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default [also] apply.”). The Court then cited this language in *Sanchez-Llamas*. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351-52 (2006).

104. *Sanchez-Llamas*, 548 U.S. at 356 (emphasis in original).

failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim.”¹⁰⁵

There is some merit to the Court’s perspective in this regard, but the Court is woefully far off the mark in at least one respect. The Court goes on to decry a “parade of horrors,” asserting that if procedural defaults are invalidated for Article 36 claims, “rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the face of Article 36 claims.”¹⁰⁶ This deduction is plainly unwarranted. The reason that procedural defaults so offend Article 36 is that Article 36 guarantees the provision of information to a criminal defendant in detention, and the benefits of Article 36 cannot be enjoyed by a criminal defendant unless he or she knows about them. The receipt of knowledge about the benefits of Article 36 is the purpose of the Article. For a state to refuse to inform a detainee of these benefits, as it is required to do, and then penalize the detainee for not having been informed about them, is circular. No such circularity arises regarding statutes of limitation or quantitative limits on habeas petitions. Procedural bars arising from such limitations could well be opposable against detainees without penalizing them for a lack of information that it was the state’s treaty-based duty to supply.

In any event, the continuing vitality of state procedural default rules against detainees who have not asserted Article 36 claims within applicable time limits appears certain. Accordingly, as far as the Supreme Court is concerned, no judicial relief is available to detainees who have not asserted an Article 36 claim within the time frame required by applicable state law. The procedural default rule thus represents the first of several Dead Ends in the *Medellín* Maze.

C. A Second Probable “Dead End”: Individual Enforceability

As noted above, the interpretation of a treaty often involves the question of whether rights mentioned in the treaty are judicially enforceable by individuals in domestic courts. That has been a key element of contention in recent years as to VCCR Article 36.

Significant international authorities have lined up on the side of individual enforceability. In both its *LaGrand* and *Avena* judgments, the ICJ concluded that “Article 36, paragraph 1 creates individual rights.”¹⁰⁷ Granted, in both those proceedings, as is required under the ICJ Statute,¹⁰⁸ the litigating party was Mexico rather than the individuals involved. However, the logical consequences of the ICJ view are relatively clear. If the ICJ believes that Article 36 creates individual

105. *Id.* at 356-57.

106. *Id.* at 357.

107. *LaGrand*, 2001 I.C.J. at 494, quoted and cited in *Avena*, 2004 I.C.J. at 36.

108. Article 34, paragraph 1 of the ICJ Statute declares that “[o]nly states may be parties in cases before this Court.” Accordingly, the ICJ would rarely have a basis for directly determining whether any particular domestic court would be required to hear a claim of treaty violation brought by an individual. Such an issue could arise if a treaty were to provide for direct enforcement through court proceedings brought by an individual. But the ICJ Statute makes no such assertion.

rights, it could well follow that those rights would need to be of the type that are individually enforceable in domestic jurisdictions. Neither the *LaGrand* judgment, nor the *Avena* judgment requires this result, but such a result would probably be most consonant with those judgments.

In addition, the Inter-American Court of Human Rights ("IACHR") issued an advisory opinion on October 1, 1999.¹⁰⁹ Mexico requested this advisory opinion, and the consideration of Mexico's application by the IACHR also took into account submissions by over half a dozen other North, South and Central American states, including the US, as well as by the Inter-American Commission.¹¹⁰ The IACHR concluded on this point that Article 36 "endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties"¹¹¹ The clear implication of this language was that the IACHR expected states subject to its jurisdiction that had ratified the VCCR to allow individual enforcement of Article 36.

Academic commentary offered in connection with *Medellin* and its attendant issues has been to varying effects regarding individual enforceability. In a recent symposium at Suffolk Law School, and in an account later published in the *Suffolk Transnational Law Review*, this point was addressed by some of the participants, specifically regarding the rights at issue in *Medellin*.¹¹² None of them found against individual enforceability, and those who addressed the point either favored individual enforceability or seemed decidedly open to it.¹¹³

On the other hand, some academic commentators have addressed the issue of individual enforceability of treaties after *Medellin* in more general terms. They tend to view the majority opinion in *Medellin* as boding poorly for private judicial enforcement of treaty rights. This emanates from, among other factors, the Court's allusion in *Medellin* to the assertion in the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* that "international agreements . . . generally do not create private rights or provide for a private cause of action in domestic courts."¹¹⁴

Especially cogent in this regard is commentary by John Parry, who states that the *Medellin* majority opinion generally "seems hostile to enforcement of treaties in

109. *The Right to Information on Consular Assistance in the Framework of Guarantees of Due Process of Law*, Inter. Am. Ct. H.R. Advisory Opinion OC-16/99 (Oct. 1, 1999) [hereinafter IACHR Advisory Opinion].

110. *Id.* at 9-34.

111. *Id.* at 50.

112. Two of the commentators who have most directly addressed the issue up to now are Jordan Paust and Christina Cerna, whose observations are discussed in the immediately following note.

113. Paust, *supra* note 67 ("I agree with the ICJ, the Inter-American Court of Human Rights and others that individuals have rights under the Convention."); Christina M. Cerna, *Medellin v. Texas: A Symposium Lead Article: The Right to Consular Notification as a Human Right*, 31 SUFFOLK TRANSNAT'L L. REV. 419, 456 (2008) ("The ICJ judgments in the *LaGrand* case and the *Avena* case were both issued prior to the U.S. withdrawal from the Protocol and held that Article 36 of the VCCR confers an individually enforceable right to consular notification.").

114. *Medellin v. Texas*, 552 U.S. 491, 506 (2008) (quoting *Restatement (Third) of Foreign Relations Law of the United States* § 907 cmt. a (1986)).

federal court proceedings brought by individuals against state actors.”¹¹⁵ In fact, Parry goes so far as to say that the decision “articulates a presumption against finding individual rights in treaties” and “stands against treaty enforcement by individuals.”¹¹⁶ Paul Stephan finds it clear that, after *Medellin*, “one cannot claim that the Supreme Court accepts a presumption in favor of judicial enforcement of treaty provisions.”¹¹⁷ Christina Cerna notes that two of the ICJ judges who sat for the *LaGrand* judgment “questioned the majority’s finding that an obligation to individuals had been breached, rather than solely an obligation to the State.”¹¹⁸

The determinations of US courts that have considered the issue do not, on balance, support individual enforceability. Of the half-dozen or so recent court of appeals cases that have involved the status of the VCCR before US domestic courts, only one majority ruling has found that the protections of Article 36 are judicially enforceable by private individuals. One of the earliest points at which this issue was judicially addressed was in the Fourth Circuit decision in *Breard v. Pruett*,¹¹⁹ one of the precursors to the Supreme Court’s *Breard* ruling. Although the three-judge panel only dealt with the Article 36 claim from the standpoint of procedural defaults, and did not address the issue of individual enforceability, the concurring opinion by Judge Butzner stated that, “[t]he Vienna Convention is a self executing treaty—it provides rights to individuals rather than merely setting out the obligations of signatories. The text emphasizes that the right of consular notice and assistance is the citizen’s.”¹²⁰

The year after *Breard*, the Ninth Circuit considered whether evidence secured in violation of Article 36 needed to be suppressed; in determining that suppression was not required, the court did not directly address the general question of individual judicial enforceability.¹²¹ Nevertheless, two dissenting opinions were more charitable to notions of individual judicial enforceability.¹²² A year later, in the case of *United States v. Li*,¹²³ the First Circuit majority also found that evidence obtained in violation of Article 36 did not need to be suppressed, without specifically addressing individual enforceability. One concurring opinion

115. Parry, *supra* note 11, at 60.

116. *Id.* at 36. For a fuller discussion of the appellate cases before *Medellin* and how they relate to the issue of private judicial enforceability, *see id.* at 63-67.

117. Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11, 11 (2009). In this respect, he answers earlier arguments by Carlos Manuel Vázquez to the effect that the Supremacy Clause supports a presumption in favor of self-execution. Vázquez, *supra* note 13. Although this colloquy relates specifically to self-executing status, a treaty cannot be judicially enforced by an individual, standing on its own, unless it is at least self-executing.

118. Cerna, *supra* note 17, at 445 (referencing the separate opinions of Judges Shi and Oda).

119. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998).

120. *Id.* at 622 (Butzner, J., concurring; internal citation omitted). The quoted passage betrays confusion between the concept of self-execution and individual enforceability, but in point of substance seems to be referencing the idea of individual enforceability.

121. *See generally* *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 1999).

122. *See id.* at 889-90 (Boochever, J., dissenting); *id.* at 895 (Thomas, J., dissenting).

123. *United States v. Li*, 206 F.3d 56 (1st Cir. 2000).

maintained that Article 36 rights were not individually enforceable,¹²⁴ and one argued that they were.¹²⁵

The Fifth Circuit subsequently found against individual enforceability in *United States v. Jimenez-Nava*,¹²⁶ a non-capital case involving counterfeit immigration documents. In *Jimenez-Nava*, the Fifth Circuit presented a detailed analysis and determined that “the presumption” against “judicially enforceable rights . . . ought to be conclusive” in that case.¹²⁷

Three years later, in the precursor to the *Medellin* Supreme Court opinion, the Fifth Circuit declared, “we are bound to apply this holding [*Jimenez-Nava*], the subsequent decision in *LaGrand* notwithstanding, until either the Court sitting en banc or the Supreme Court say otherwise.”¹²⁸ Of course, no such contrary superior opinion has yet emerged. In fact, the Oregon Supreme Court then followed suit when, in its version of *Sanchez-Llamas*, it concluded that “Article 36 does not create rights to consular access or notification that a detained individual can enforce in a judicial proceeding.”¹²⁹

In 2007, in *Cornejo v. County of San Diego*, a Ninth Circuit majority directly held that Article 36 rights were not judicially enforceable by private persons.¹³⁰ Once again, however, there was a dissent maintaining that such rights should be individually enforceable.¹³¹ In 2008, both the Second and Eleventh Circuits issued opinions involving Article 36 violations; in neither case did the majority find in favor of private judicial enforceability. In the Second Circuit case, the court never addressed the issue of individual judicial enforcement,¹³² and the Eleventh Circuit determined that Article 36 is not privately judicially enforceable.¹³³ With the Eleventh Circuit decision, however, there was a “special concurrence” finding individual judicial enforceability.¹³⁴

The Seventh Circuit is the only Circuit that has issued a majority opinion finding in favor of private judicial enforcement of Article 36 rights, and it did so twice as a result of two successive considerations of the same case.¹³⁵

The Supreme Court has declined to resolve this issue three times. In *Breard*, the Court noted in passing that Article 36 “arguably confers on an individual the right to consular assistance following arrest.”¹³⁶ This brief comment probably created an inference that the Court was assuming, without deciding, that Article 36 affords the capacity for individual judicial enforcement. Next, in its *Sanchez-*

124. *See id.* at 67 (Selya, J. and Boudin, J., dissenting).

125. *See id.* at 69-70 (Torruella, J., dissenting).

126. *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001).

127. *Id.* at 198.

128. *Medellin v. Dredkte*, 371 F.3d 270, 280 (2004).

129. *Oregon v. Sanchez-Llamas*, 338 Ore. 267, 276 (2005) (en banc).

130. *Cornejo v. County of San Diego*, 504 F.3d 853, 863 (9th Cir. 2007).

131. *See id.* at 864 (Nelson, J., dissenting).

132. *Mora v. New York*, 524 F.3d 183, 187 (2d Cir. 2008).

133. *Gandara v. Bennett*, 528 F.3d 823, 825 (11th Cir. 2008).

134. *See id.* at 829-30, 832 (Rogers J., special concurrence).

135. *Jogi v. Voges*, 425 F.3d 367, 382 (7th Cir. 2005), *withdrawn*, *Jogi v. Voges*, 480 F.3d 822, 835 (7th Cir. 2007).

136. *Breard v. Greene*, 523 U.S. 371, 376 (1998).

Llamas majority opinion, the Court explicitly found it “unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.”¹³⁷ Accordingly, in that opinion, the Supreme Court majority explicitly declared, “we assume, without deciding, that Article 36 does grant [the defendants] such rights.”¹³⁸ Finally, the Court in its *Medellín* majority opinion “assumes without deciding” that “Article 36 grants foreign nationals ‘an individually enforceable right to request that their consular officers be notified of their detention’”¹³⁹

The arguments against individual enforceability of Article 36 are relatively strong. As more than one court has noted,¹⁴⁰ the preamble to the VCCR expressly states that “the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”¹⁴¹ This language could be read to disavow the ability of individuals to rely on any provisions of the VCCR as individual legal claimants. Even if read to be limited to those aspects of the VCCR described as “privileges and immunities,” Article 36 is one of the provisions included within the Convention’s section on “privileges and immunities,” and so it would be subject to this limitation.¹⁴² The IACHR, at a crucial point in its Advisory Opinion, quoted the aforementioned language from the preamble, and allowed that the VCCR would “not appear to be intended to confer rights to individuals; the rights of consular communication and notification are, ‘first and foremost’, rights of States.”¹⁴³ However, immediately after making this momentary concession, the IACHR noted that “the ‘individuals’ to whom [the preamble] refers are those who perform consular functions,” and that “the clarification [in the preamble] was intended to make it clear that the privileges and immunities granted to them were for the performance of their functions.”¹⁴⁴ The implication seems to be that the exclusion of rights only vitiates putative rights of consular officials and employees, and that the rights of other sending State nationals are not thereby excluded in the preamble. But this argument is unpersuasive because the limitation to consular officials could just as easily cut the other way. If consular officials, who are the main beneficiaries of the VCCR’s privileges and immunities, cannot even claim individual rights under it, it is all the more arguable that mere citizens of the sending State would be in a less optimal position to do so.

137. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006).

138. *Id.*

139. *Medellín v. Texas*, 552 U.S. 491, 506 (2008).

140. *E.g.*, *United States v. Jimenez-Nava*, 243 F.3d 192, 196 (5th Cir. 2001) (“This language would appear to preclude any possibility that individuals may benefit from it when they travel abroad, even, perhaps, if they are among the consular corps.”). The Inter-American Court of Human Rights also addresses this argument, as described in the text accompanying notes 143-44, *infra*.

141. Vienna Convention on Consular Relations, *supra* note 3, pmbl., cl. 5.

142. *Id.* ch. II, arts. 28-39.

143. IACHR Advisory Opinion, *supra* note 109, at 47, ¶ 73.

144. *Id.* at 47, ¶ 74.

Some courts seize upon the wording of Article 36, which in subparagraph 1(b) refers to the "rights" of the detainees it references.¹⁴⁵ However, as noted earlier, many international treaties use the word "rights" in contexts where it is clear that domestic judicial relief for individuals is neither required nor even contemplated. It is especially telling that the ICCPR, one of the foremost conventions in the field of human rights, is in this category.¹⁴⁶

The IACHR also cited interpretive methodology as a basis for finding that Article 36 imparted individual rights. It stated that the question is not so much whether Article 36 guarantees individual human rights, but "whether it concerns the protection of human rights" within the Court's geographic ambit.¹⁴⁷ The IACHR attaches importance to this interpretive distinction as a result of its past jurisprudence on interpretation. But US federal courts are not obliged to adopt the IACHR's interpretative traditions, and they are unlikely to do so.

The findings against individual enforceability also have noted that a relatively small number of provisions of the VCCR address the position of individual nationals. In *Jimenez-Nava*, for example, the Fifth Circuit panel declared that "only one article out of 79 in the Treaty even arguably protects individual non-consular officials."¹⁴⁸ While one might quibble with the precision of this statement,¹⁴⁹ it is certainly the case that the vast majority of the VCCR's provisions do not touch on individual nationals of either the sending or receiving State.

In arguing against individual enforceability, it is also noteworthy that the origin of the VCCR is the ILC, as described earlier.¹⁵⁰ When the ILC was preparing drafts of treaties such as the VCCR, it was engaged primarily in the codification of the existing standards of international law and practice, through vehicles such as the 1958 Law of the Sea Conventions, the Vienna Convention on the Law of Treaties, and the VCDR. It was plainly not a primary goal of the ILC at that point to draft treaties dealing with individual rights. Provisions such as Article 36 of the VCCR are included to help assure the effective operation of consular services, rather than to establish human rights norms.

145. E.g., *Jimenez-Nava*, 243 F.3d at 196 (emphasizing the impact of some of "the references to 'rights' in Article 36"); IACHR Advisory Opinion, *supra* note 109, at 48, ¶ 78 ("The text in question makes it clear that both the consular officer and the national of the sending State have that right . . .").

146. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S.171; see also *supra* text accompanying notes 62-64.

147. IACHR Advisory Opinion, *supra* note 109, at 46, ¶ 72; *id.* at 47, ¶ 76 (emphasis in both original passages).

148. *Jimenez-Nava*, 243 F.3d at 196.

149. See, e.g., Vienna Convention on Consular Relations, *supra* note 3, art. 37(b) (requiring a receiving State "to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity"), which, since it involves the protection of minors or vulnerable adults, could be read to involve protection of individuals with relative ease. *Id.* art. 5. And the blanket description in Article 5 of all the "Consular Functions" normally carried on by consular posts includes "helping and assisting nationals, both individuals and bodies corporate, of the sending State," *id.* art. 5(e), and safeguarding the interests of nationals . . . in cases of succession *mortis causa*. *Id.* art. 5(g).

150. See *supra* text accompanying notes 36-46.

Perhaps the most powerful argument against an individual rights interpretation has been offered by Christina Cerna, who has trenchantly suggested that if Article 36 really were meant to provide for personal human rights of detainees, Article 36 would not make the satisfaction of those rights optional with the sending State consular officers, as it plainly does.¹⁵¹ Article 36 leaves any and all actions in aid of sending State nationals to the discretion of sending State consular officers in the receiving State. It is difficult to see how this could be the case if Article 36 rights were personal human rights of detainees.¹⁵²

On balance, it seems unlikely that the Supreme Court would find that Article 36 creates personal rights that are enforceable by individuals in US courts. The Court seems especially indisposed after *Medellín* to recognize such rights as a general matter, and the arguments against such rights in this context seem substantive and formidable. Determining whether a finding against such rights is the best resolution of the issue is not the point of this article; rather, this article only hopes to elucidate what the most likely result would be in the federal courts. Accordingly, the “individual rights” aspect of Article 36 constitutes a dramatic Dead End in the *Medellín* Maze.

D. Enforcement Through the Executive Branch as a Certain “Dead End”

In investigating possible escape routes from the *Medellín* Maze, this article now addresses the possibility that a US President could order American courts to insist on Article 36 compliance in their proceedings, or order police officials within US states to abide by the terms of Article 36 in their arrest procedures. Indeed, on the *Medellín* facts, President George W. Bush did issue a presidential memorandum to the Attorney General. However, the memorandum was not directed towards the general enforcement of Article 36, but rather specifically to the “reconsideration and review” mandated by the ICJ’s *Avena* judgment. Nevertheless, the Court’s treatment of that presidential memorandum is indicative of how the Court would treat any presidential attempt to enforce Article 36 generally. A presidential mandate in this area is apt to result in another Dead End in the *Medellín* Maze.

Indeed, the Supreme Court’s *Medellín* opinion appears to be on reasonably firm ground when it refuses to give effect to the presidential memorandum President Bush issued. The key provision of the memorandum reads:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the

151. See Cerna, *supra* note 113, at 427.

152. It is conceivable that detainees might value simply the ability to contact their consular officers, even if the officers decide not to assist them. However, the incremental and marginal nature of any utility thereby experienced by the detainees makes the existence of an individual right seem less compelling. Under these circumstances, after all, detainees’ communication with the consular officers would have no practical effect on the detainees. In this respect, the situation is very different from the dynamics that result from the acknowledged “right” to communicate with counsel, for example.

decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.¹⁵³

Even the text of the memorandum hints at its own deficiency. The awkwardness of the locution, "the United States will discharge its obligations . . . by having State courts give effect to the decision" bespeaks its problematic character. A more direct and less awkward way of communicating the apparently intended idea would have been to say: "I, as President, shall assure that the United States discharges its obligations through my directive, which I hereby transmit, ordering state courts to give effect to the decision."

Of course, it is difficult to believe that any US President would issue such a memorandum. This is because the language of command, "I hereby order state courts to give effect," would tend to remind the reader that the President does not have the authority to require state courts to do anything of the kind. The key realization here is the requirement that judicial operations maintain the required degree of constitutional independence. As far back as 1792, with the publication of *Hayburn's Case*,¹⁵⁴ it has been clear Supreme Court doctrine that the Executive has no power to intervene in federal judicial proceedings. And the strictures of *Hayburn's Case* apply to intervention in federal courts; any attempted interference in state courts should be all the more constitutionally problematic. The Supreme Court's use of the phrase, "by having the State courts give effect" seeks to avoid language, such as the posited language above, that would draw attention to its own invalidity.¹⁵⁵ But this is to no avail, because the resulting awkwardness makes clear the linguistic feint that the Executive attempted in issuing this memorandum.

In its *Medellin* opinion, the Supreme Court makes relatively short work of the suggestion that the President has the authority to effectuate an order of the kind that President Bush issued in the *Medellin* situation. The Court does not rely on the broad separation of powers concerns noted above but, in response to the arguments presented by the Executive, addresses the nature of the treaties involved. The Court refers to the UN Charter and the Optional Protocol to the VCCR,¹⁵⁶ and suggests that giving effect to the President's memorandum would allow the President to "unilaterally convert[] a non-self-executing treaty into a self-executing one."¹⁵⁷ Presumably, if either the UN Charter or the Optional Protocol specifically gave executive officers in adhering countries the authority to influence court proceedings, and if those agreements were self-executing in the US, the Court

153. *Medellin v. Texas*, 552 U.S. 491, 502-03 (2008) (citing the *application to petition for cert.*).

154. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

155. See *infra* text of Presidential Memorandum, provided in accompanying text at note 153.

156. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325 (1970). The US initially entered into this opportunity simultaneously with its adoption of the VCCR, but withdrew from the Optional Protocol in 2005, shortly after the ICJ issued its judgment in *Avena. Medellin*, 552 U.S. at 500.

157. *Medellin*, 552 U.S. at 525.

might have decided the question in another way. But neither agreement contains such a specific grant of power, and the Court clearly views both agreements as non-self-executing.

The *Medellín* Court also considers the possibility that the President might have inherent constitutional foreign affairs power to issue a document such as his memorandum to the Attorney General. The proponents of the memorandum were probably hoping that it could be analogized to the presidential claims-settlement orders in cases like *United States v. Belmont*¹⁵⁸ and *United States v. Pink*.¹⁵⁹ As the Court pointed out, those cases involved factual circumstances of a distinct kind.¹⁶⁰ In those situations, the President ordered that funds being held under state law be disposed of in certain ways pursuant to executive agreements the President had concluded with the then nascent Soviet Union. The relevant facts thus involved a particular kind of executive agreement—that is, the kind of agreement regarding recognition of foreign states and governments—that is absent from the facts of *Medellín* and other cases regarding Article 36 enforcement.

Jordan Paust, advancing a view contrary to the Court's perspective, has stated that, "under the Constitution state judges cannot" ignore "the mandate of the *Avena* judgment or . . . avoid its implementation."¹⁶¹ He accordingly concludes that "after the President's directive, the state courts are left basically where they had been without his directive, i.e., with a minimal conforming discretion to choose appropriate means for review and reconsideration of convictions and sentences."¹⁶² At the very least, it would seem that under Paust's approach, the presidential memorandum should have been given effect. As noted earlier, however, any presidential directive regarding the conduct of proceedings in state courts would encounter substantial separation of powers and federalism issues.

Again, the focus of this article here is not to define what the most correct view of such issues might be, but to identify what perspective the Court is likely to adopt. Given that the Court was unwilling to give effect to the President's memorandum when it was designed to implement the UN Charter, Optional Protocol, and ICJ Statute, it is unlikely to do so when the rule contained in a presidential order is Article 36 itself. Indeed, it is clear that any attempt to use an executive order or directive to enforce Article 36, without any supporting treaty language or legislation, would be a Dead End in the *Medellín* Maze.

158. *United States v. Belmont*, 301 U.S. 324 (1937).

159. *United States v. Pink*, 315 U.S. 203 (1942).

160. *Medellín*, 552 U.S. at 531 ("The claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.").

161. Jordan J. Paust, *Medellín, Avena, The Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301 (2008), at 317.

162. *Id.*

E. Enforcement Through Congress Quite Possibly Another "Dead End"

In its *Medellin* opinion, the Supreme Court repeatedly stresses that there is no binding federal legislation implementing ICJ judgments.¹⁶³ These statements by the Court seem to suggest that Congress could direct state courts to enforce ICJ judgments directly if it passed federal legislation to that effect.¹⁶⁴ Furthermore, at a critical juncture, the Court admits that "Congress could elect to give [ICJ judgments] wholesale effect . . . through implementing legislation, as it regularly has."¹⁶⁵ The Court thus might seem to take the position that Congress could require state courts to enforce ICJ judgments.

Given these statements by the Court, it is tempting to go further and suggest that, as far as the Court is concerned, Congress could also legislatively require state authorities to enforce Article 36. Activists and diplomatic and consular personnel might well prefer this approach because it is more direct. Rather than simply authorizing state courts to implement ICJ judgments requiring Article 36 compliance, Congress could require state governmental authorities, *ab initio*, to inform detainees and notify consular officers, as specified in the Convention. Surely, from a practical point of view, if Congress is able to do the one, efficiency and operational logic, at least, would indicate that it should be able to do the other. However, it is by no means clear that potentially applicable Supreme Court precedents would allow Congress to enact legislation requiring that state law enforcement officials comply with Article 36. It is well known that the Supreme Court has, in recent years, been embarking on a judicial program of "New Federalism."¹⁶⁶ This judicial program has restricted Congress from directing states to take certain actions traditionally considered within the scope of their sovereign prerogatives.¹⁶⁷ A federal statute requiring state officials to provide information to detainees and notices to consular officials, pursuant to Article 36, would impose such a requirement in the context of state officials' routine work in the enforcement of state criminal laws. A federal mandate that state criminal laws be enforced along certain lines, even if founded in international treaty obligations, could well run afoul of the doctrine of New Federalism.

163. *E.g.*, *Medellin*, 552 U.S. at 505 ("Only '[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment.'") (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)) (implying that Congress could give ICJ judgments force and effect *through* such a "legislative enactment"). *Id.* at 506. "Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law." *Id.* This quote implies that the judgment would be binding law if such legislation existed, apparently conceding that such legislation could constitutionally exist.

164. *See supra* the parenthetical explanations in note 163.

165. *Medellin*, 552 U.S. at 520.

166. *See, e.g.*, Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185 (2008).

167. *See, e.g., id.* at 1190-92.

The most cogent case in this context is also one of the foundational cases of New Federalism, *Printz v. United States*.¹⁶⁸ In *Printz*, the Court invalidated provisions of a federal law that purported to require state law enforcement officers to administer the provisions of federal gun control legislation.¹⁶⁹ After considering its view of history, constitutional structure, and earlier case law, the Court determined that “congressional action compelling state officers to execute federal laws is unconstitutional.”¹⁷⁰ This review induced the Court to believe that the Constitution established a system of “dual sovereignty,” in which sovereignty retained by the states was, although “residuary,” still inviolable.¹⁷¹ Federal control of state officers was found to be generally impermissible, not merely for reasons of federalism, but because it “would also have an effect upon . . . the separation and equilibration of powers between the three branches of the Federal Government itself.”¹⁷² Finally, the Court concluded that, “the Federal Government may not compel the States to enact or administer a federal regulatory program.”¹⁷³

It certainly would be arguable that a federal statute requiring state law enforcement officers to abide by the terms of Article 36 would fall victim to the same doctrine that was used to invalidate the gun control act in *Printz*. Such a statute could easily be seen as “congressional action compelling state officers to execute federal laws.” The fact that the federal laws were authorized by a treaty would not seem to be a terribly significant distinction from the *Printz* facts. Treaties are the “Law of the Land” under the Supremacy Clause,¹⁷⁴ as is the Commerce Clause of the Constitution, on which the statute in *Printz* was founded. States value their “dual sovereignty” and may view it as no less “inviolable” when the federal law pertains to procedural requirements applicable upon the detention of criminal defendants (such as are required by Article 36), than when it pertained to the control of handgun sales. To the extent that federal mandates regarding handgun sales restrictions could weaken presidential power through the congressional allocation of duties to the states, such weakening could also be experienced through congressional allocation of treaty compliance obligations to the states. Finally, in requiring local state law enforcement officers to abide by Article 36, Congress would certainly be “compelling the States to administer a federal regulatory program.”¹⁷⁵ Again, the fact that the program was based in treaty obligations would arguably be immaterial.

168. *Printz v. United States*, 521 U.S. 898 (1997).

169. Brady Handgun Violence Prevention Act, Pub. L. No. 103-59, 107 Stat. 1536 (1993).

170. *Printz*, 521 U.S. at 905 (“Petitioners here . . . contend that congressional action compelling state officers to execute federal laws is unconstitutional.”); *id.* at 918 (“[C]onstitutional practice we have examined . . . tends to negate the existence of the congressional power asserted here.”).

171. *Id.* at 918-19.

172. *Id.* at 922.

173. *Id.* at 933 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

174. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

175. See *supra* text accompanying note 173.

Craig Jackson squarely addresses the potential effect of New Federalism on fact patterns of the type at issue in *Medellin*.¹⁷⁶ As a general matter, he asserts that "U.S. interests are best served by allowing the federal government to enter into important international obligations without the impediment of notions of federalism best applicable to domestic policy scenarios."¹⁷⁷ In that connection, he quite reasonably asserts that "the treaty power is not limited by the Tenth Amendment," since "a power that is constantly subject to attack under the rubric of federalism"¹⁷⁸ would run counter to the principles of *Missouri v. Holland*.¹⁷⁹

Jackson also considers the extent to which the ruling in *Printz* could impair congressional enforcement of international law obligations. He suggests that "[t]he reasoning in *Printz* [in] its domestic setting does not set the stage for an anti-commandeering foreign policy principle."¹⁸⁰ This observation is based on the concern—underlying part of the *Printz* rationale—that congressional devolution of federal enforcement authority to the states can have decentralizing effects. Jackson then asserts that, in matters of foreign policy, a greater danger of decentralization comes from refusing to recognize the ability of Congress to enforce international law and, instead, devolving this power to state enforcement.¹⁸¹

He also notes that the anti-commandeering principle that underlies much of the New Federalism can work in favor of federal enforcement of international law. He cogently observes that the anti-commandeering doctrine of cases such as *New York v. United States*¹⁸² are based in part on the idea that "federal officials should take the heat for mandates forced upon state and local governments lest those government officials be blamed for a particular federally mandated policy."¹⁸³ But because "in foreign affairs there can be no mistaking the identity of the responsible government," namely, the federal government, there is no basis for applying the anti-commandeering doctrine where Congress is legislating to enforce obligations under international law.¹⁸⁴

Notwithstanding these considerations, it is still quite possible that federal courts would apply the *Printz* rationale to a federal statute enforcing Article 36. To

176. See generally Craig Jackson, *The Anti-Commandeering Doctrine and Foreign-Policy Federalism—The Missing Issue in Medellin v. Texas*, 31 SUFFOLK TRANSNAT'L LAW REVIEW 335 (2008).

177. *Id.* at 350.

178. *Id.* at 358.

179. In *Missouri v. Holland*, the Supreme Court upheld the authority of the US Congress to enact a statute protecting migratory birds, based on a treaty between the US and Canada mandating such protections, at a time when Congress would arguably not have had authority to enact the statute absent the treaty. See *Missouri v. Holland*, 252 U.S. 416 (1920).

180. Jackson, *supra* note 176, at 371.

181. *Id.* at 368 ("[Justice Scalia] argues that by decentralizing the presidential function of enforcing the laws of the United States, '[t]he unity in the Executive Branch of the Federal Government would be shattered, and the power of the President would be subject to reduction, if Congress could . . . require state officers to execute its laws.' . . . In matters of foreign policy as in *Medellin*, however, the danger of decentralization is not in the disparate and uncoordinated implementation, but in the failure to implement foreign policy brought on by decentralization.").

182. *New York v. United States*, 505 U.S. 144 (1992).

183. Jackson, *supra* note 176, at 374.

184. See *id.*

begin with, the anti-commandeering principle is inapposite in such a situation. That principle, as developed in *New York v. United States*, restrains the ability of Congress to require state legislatures to legislate in their own right.¹⁸⁵ The full reference to “commandeering” in *New York v. United States* castigates the federal government for passing a federal law that “commandeers the legislative process of the States,”¹⁸⁶ that is, for telling state legislatures how to legislate.

That would not be a necessary feature of a federal statute requiring state compliance with Article 36. Rather, for the federal statute to have effects that were most direct, and most responsive to requirements of international law, it would need to direct state law enforcement officers to comply with Article 36. This would not necessarily require state legislation. It would, however, involve “pressing the state law enforcement officers into the federal service,”¹⁸⁷ the type of action directly at issue in *Printz*, rather than in *New York v. United States*. Accordingly, commandeering of the type described in *New York v. United States* is not at issue here, whereas the *Printz* rationale is.

The Court’s concern in *Printz* about decentralization can, if taken at face value, impose serious and counter-intuitive consequences. It is a kind of “centralization” that can prevent Congress from imposing uniform behavioral standards on law enforcement authorities in an area of substantial national concern: handgun sales. Similarly, the *Medellín* result allows different states throughout the country to allow for Article 36 relief, or not, based on individuated judicial procedural rules. If the *Printz* concern for centralization, such as it is, requires invalidation of congressional legislation imposing uniform police behavior in handgun control, it is difficult to see why it might not also require invalidation of congressional legislation imposing the uniform police behavior prescribed by VCCR Article 36.

It might be argued that international law stands on different constitutional footing than the Commerce Clause. That is, one might assert that a stronger degree of uniform behavior across states is necessary to implement the former, rather than the latter. However, proponents of New Federalism have been creative in attempting to debunk the necessity for federally imposed uniformity of

185. *New York v. United States*, 505 U.S. at 175. Justice O’Connor criticizes the so-called “take title” feature of the Low-Level Radioactive Waste Policy Amendments Act of 1985 because the two provisions of the Act involved with this issue would have been either “no different than a congressionally compelled subsidy from state governments to radioactive waste producers” or “indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents.” *Id.* at 175. The assumption by the state of either the subsidy or the liabilities would have required legislative action by the state legislature. Accordingly, Justice O’Connor observes, for the Court, that, “[s]tanding alone, this provision . . . would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.” *Id.*

186. *Id.* at 176 (“[T]he Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

187. *Printz v. United States*, 521 U.S. 898, 905 (1997) (“Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional.”).

international law. Most recently, Robert Ahdieh has attempted to argue against federal hegemony in enforcing international law, and has favored instead giving a greater voice to the states, namely, putting faith in the ability of the states to engage in "coordination" vis-à-vis external relations.¹⁸⁸ Before him, Curtis Bradley and Jack Goldsmith argued that customary international law, previously thought to be safely within the federal purview, should actually be viewed as an element of state law.¹⁸⁹ And before that, David Golove alerted us to the revisionist types of views that have attended continued examination of *Missouri v. Holland*.¹⁹⁰ The views involved in these observations have not yet been adopted by the Supreme Court. But in the atmosphere of New Federalism and the *Medellin* decision, they need to be taken quite seriously.

It can by no means be assured that federal courts will view the international law context of Article 36 as deserving of any more federally imposed uniformity than the gun safety law context of *Printz*. Accordingly, there is an appreciable chance that direct federal legislation requiring states to comply with Article 36 will be yet another Dead End in the *Medellin* Maze.

Of course, the Supreme Court in *Avena* leaves open the possibility that federal legislation could enforce the *Avena* judgment itself, rather than Article 36 more generally. In other words, the Supreme Court might view more favorably a federal statute giving an ICJ judgment "wholesale effect."¹⁹¹ That would be a different proposition than a general Article 36 enforcement statute, and would be a good deal less useful. For one thing, the *Avena* judgment, by its terms, only applies to the detainees and US states named in the judgment. Furthermore, it is far less useful, and probably fatally impractical for defendants, to require an ICJ judgment every time Article 36 is violated. In order for a federal statute to afford meaningful vindication of Article 36 rights, it would probably need to address the state law enforcement authorities directly. And that, as just noted, is a Dead End.

F. Enforcement by International Tribunals as Yet Another "Dead End"

The discussion so far has demonstrated that there are several Dead Ends to federal judicial enforcement of Article 36 rights. We have seen that US courts are probably predisposed to find that Article 36 protections cannot be enforced judicially by individuals, that procedural default rules present a bar to tardy claims by detainees, that unilateral actions by the Executive Branch to mandate such protections have been and will be deemed invalid, and possibly even that the role of Congress in enforcing such protections can be limited.

188. See generally Robert H. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185 (2008).

189. See generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

190. See generally David M. Golove, *Treaty-Making Power and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

191. *Medellin v. Texas*, 552 U.S. 491, 520 (2008).

In the face of these frustrations, one temptation is to seek enforcement of Article 36 protections in international tribunals. Of course, the primary holding of the Supreme Court's *Medellín* decision is that the ICJ's *Avena* judgment, which attempts to enforce Article 36, does not constitute "directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions."¹⁹² The language within that opinion is even more sweeping. At one point, the Court heavily suggests that, as a general proposition, "ICJ judgments were not meant to be enforceable in domestic courts."¹⁹³ The Court's chief reason for so concluding is that the view that "ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94" of the UN Charter.¹⁹⁴ The Court also finds in the text of the ICJ Statute evidence it considers persuasive for the proposition that "the ICJ's *Avena* judgment does not automatically constitute federal law judicially enforceable in United States courts."¹⁹⁵ These considerations also primarily motivated the Court in *Sanchez-Llamas* when it declared that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts."¹⁹⁶ Also in that decision, the Court based its analysis in part on the observation that, where treaties are concerned, "determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."¹⁹⁷

In terms used by Margaret McGuinness, the Court's perspective on the direct application of ICJ judgments could be called "internal/constitutional."¹⁹⁸ As such, in the Court's view, it derives its judicial authority from the Constitution and its prescribed role in the constitutional framework. This is consistent with an entirely "dualist" notion of the relationship between domestic law and international law.¹⁹⁹ If the Court adopted what theorists call a "monist" view of that relationship,²⁰⁰ the

192. *Id.* at 491.

193. *Id.* at 509.

194. *Id.* at 511. Article 94(1) of the UN Charter imposes the requirement that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter art. 94(1). The Court maintains that this method of enforcing ICJ judgments would not have been established if ICJ judgments were required to be independently enforceable in domestic courts. *Id.*

195. *Id.* at 511. The Court has two basic reasons for this: the ICJ Statute's statement that the ICJ "can hear disputes only between nations, not individuals," *id.* (citing Article 34(1) of the ICJ Statute), and the Statute's insistence that "[t]he decision of the [ICJ] has no binding force except between the parties and in respect of that particular case." *Id.* (citing Article 59 of the ICJ Statute).

196. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006) (citing Articles 34 and 59 of the ICJ Statute and Article 94(1) of the UN Charter).

197. *Id.* at 353 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

198. McGuinness, *supra* note 17, at 234 ("The Internal/Constitutionalist narrative frames the issue of America's interaction with international law from the inside looking out. It adopts a vocabulary reflecting the history, internal structures, and jurisprudential traditions of the Constitution.").

199. *Id.* ("This narrative is consistent with the doctrine of dualism, which posits that international law is not superior to national law, but rather remains outside and parallel to the Constitution.").

200. A sample definition of the monist perspective is offered by Malcolm Shaw in his discussion of some of the theories of Hans Kelsen: "International law and municipal law are not two separate systems but one interlocking structure and the former is supreme. Municipal law finds its ultimate

Court might have viewed ICJ decisions differently in *Sanchez-Llamas* and *Medellin*. However, the dualist perspective seems firmly entrenched in the Court.²⁰¹

Paul Stephan has presented an argument regarding the relationship between the domestic judiciary and international tribunals generally.²⁰² He considers whether international comity might be used as a rationale supporting the domestic judicial enforcement of rulings by treaty-based international tribunals. He maintains that "dynamic reciprocity characterizes interstate relations," and that this dynamism is the "core premise" of the comity concept.²⁰³ He defines this dynamism as being composed of reciprocity, non-recognition (of foreign judgments that do not reciprocally recognize US judgments), dynamic interaction, and discrimination (allowing respect for judgments from cooperative states and disallowing it for judgments from uncooperative states).²⁰⁴ In his view, "states lack the capacity to respond reciprocally to the behavior of international dispute settlement bodies," and "these bodies also find it hard to respond reciprocally to state behavior."²⁰⁵ Accordingly, "whatever else may justify the willingness of US judges to enforce the decisions of international dispute settlement bodies, comity cannot do the job."²⁰⁶

In view of the dualism described by McGuinness, as more than amply demonstrated by *Sanchez-Llamas* and *Medellin*, the Court is extremely unlikely to give effect to interpretations of Article 36 offered by supranational tribunals, even apart from the ICJ. Stephan has demonstrated that the concept of comity would be unlikely to furnish an alternative basis for giving them effect. Accordingly, the prospect of using international tribunals as a means of enforcing Article 36 rights in American courts is also clearly a Dead End.

G. *Corrective Injunction Sought by Sending State as an Eleventh Amendment "Dead End"*

As previously described, several lower courts have determined that Article 36 and the VCCR do not establish rights that individuals can enforce directly in US courts.²⁰⁷ It also was noted earlier that the Supreme Court demurred on the issue of individual enforcement in *Medellin*,²⁰⁸ and that the Court is unlikely to be receptive to direct individual enforcement, if and when it decides to address the issue.²⁰⁹

justification in the rules of international law by a process of delegation within one universal normative system." MALCOLM M. SHAW, INTERNATIONAL LAW 50 (5th ed. 2003).

201. Shaw defines dualism in the context of his discussion of positivism. In his view, dualism "stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other." *Id.* at 122.

202. See generally Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11 (2009).

203. *Id.* at 16.

204. *Id.* at 17-18.

205. *Id.* at 20.

206. *Id.*

207. See *supra* text accompanying notes 120-35.

208. See *supra* text accompanying notes 136-39.

209. See *supra* text accompanying note 151.

One avenue of litigation that circumvents the question of individual judicial enforcement involves actions commenced by the detainee's sending State, rather than the detainee individually. If the sending State challenges the violation of a detainee's Article 36 rights in a US court, then the "real party" to the VCCR, the state that is a party to the treaty, is the complaining party in court. Such a challenge by a sovereign state can go forward consistent with the idea that sovereign states, rather than private individuals, are parties to treaties and are the primary entities that can complain about their violation. For such a procedure to go forward, the treaty involved must be found to be self-executing, so that its enforceability in domestic courts can be countenanced. But if the VCCR is held to be self-executing, at least as an initial matter, it opens the door for Article 36 to be enforced by sovereign states, thus avoiding the Dead End awaiting the pursuit of individual injunctive relief.

This pattern was followed in at least one line of Article 36 cases: the district court litigation in the *Breard* case in the late 1990s. Initially, Breard pursued relief in federal court on his own behalf, but the District Court for the Eastern District of Virginia found against him in 1996.²¹⁰ Breard appealed that ruling to the Fourth Circuit, which affirmed the result against Breard in 1998.²¹¹ Meanwhile, the Republic of Paraguay commenced a separate action in 1996 in the same court. In this 1996 district court action, Paraguay asked the court to: (i) declare that the Virginia state authorities violated the VCCR by failing to notify Paraguayan consular officials of Breard's arrest; (ii) declare that those authorities continued to violate the VCCR by failing to afford Paraguayan officials a meaningful opportunity to give Breard assistance during the proceedings against him; (iii) declare Breard's conviction void; (iv) enjoin the Virginia authorities from taking any action based on the conviction and declare that any further action based on the conviction would be a continuing violation of the VCCR; and (v) vacate Breard's conviction and direct the Virginia authorities to abide by the VCCR during any future proceedings against Breard.²¹²

In pursuing such relief, Paraguay was acting both in Breard's interest and in its own interest. As a sovereign party to the VCCR, it had an independent interest in assuring compliance with the terms of the treaty regarding its own nationals and consular officials. This interest has importance apart from the fate of one particular national in a particular case. As long as the court viewed the VCCR as self-executing, and therefore enforceable in domestic court proceedings, Paraguay would be in a position to advance its interests under the VCCR separate from the interests of Breard in his individual case.

210. *Breard v. Netherlands*, 949 F. Supp. 1255 (E.D. Va. 1996).

211. *Breard v. Pruett*, 134 F.3d 615, 617 (4th Cir. 1998).

212. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1272 (E.D. Va. 1996). Paraguay also complained about violations of the Treaty of Friendship, Commerce and Navigation between it and the US, but the court's treatment of that treaty is identical to its treatment of the VCCR.

In Paraguay's action, both Paraguay and the Virginia authorities viewed the VCCR as self-executing, and the District Court did not dispute that view.²¹³ Nevertheless, the District Court dismissed Paraguay's claims for relief for failure of subject matter jurisdiction. The primary consideration precluding subject matter jurisdiction was Virginia's sovereign immunity under the Eleventh Amendment.²¹⁴ The District Court noted that the Eleventh Amendment bars suits by a foreign government against a state government or its officers in federal court.²¹⁵ However, the court also noted a well-known exception to Eleventh Amendment restrictions, under the early twentieth century case of *Ex Parte Young*.²¹⁶ Under the rule of that case, a party at risk of suffering a violation of federally protected rights may seek to enjoin the offending state officers under some circumstances.²¹⁷ To take advantage of the exception under *Ex Parte Young*, intervening case law has required that two criteria be satisfied. First, the plaintiff must show that it seeks a remedy for a continuing violation of federal law. Second, the plaintiff must show that the relief requested is prospective.²¹⁸ The Virginia District Court determined that the circumstances in *Breard* did not satisfy the first of these two criteria. The court stated that Paraguay had not alleged that the Virginia authorities were, at that time, impairing Paraguay's access to *Breard*.²¹⁹ Indeed, the court emphasized that Paraguay had helped *Breard* with his individual habeas action in the very same court.²²⁰

Of course, all this was after the state authorities had initially failed to inform him of his Article 36 rights in a timely manner. But that failure was not a continuing violation for Eleventh Amendment purposes. The District Court stated that it was "disenchanted" with Virginia's failure to abide by the VCCR, and indicated that the results of Virginia's failure might have led to tragic consequences for *Breard*.²²¹ However, the court emphasized that this result was "still a *consequence* of the violation and not a continuing wrong."²²² Allowing Paraguay its requested relief in such circumstances would have accorded it "retroactive

213. *Allen*, 949 F. Supp. at 1274 ("The parties agree that the [VCCR] is 'self-executing' under th[e] definition" relating to "a treaty that does not require implementing legislation before becoming federal law.").

214. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

215. *Allen*, 949 F. Supp. at 1272. By its terms, the Eleventh Amendment only denies federal courts jurisdiction over actions against a state by "Citizens of another State or by Citizens or Subjects of any Foreign State." However, under *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), the Supreme Court expanded state immunity under the Eleventh Amendment to also apply to suits by foreign sovereign states. *See Id.*

216. *Ex Parte Young*, 209 U.S. 123, 162-63 (1908).

217. *Allen*, 949 F. Supp. at 1272.

218. *Id.* at 1272 (citing *Green v. Mansour*, 474 U.S. 64, 68 (1986)).

219. *Id.* ("There is no allegation that defendants refuse to allow plaintiffs to give Mr. *Breard* legal assistance.").

220. *Id.*

221. *Id.* at 1273.

222. *Id.*

relief,”²²³ which is precisely what the *Ex Parte Young* exceptions, as progressively interpreted, preclude.

A panel of the Fourth Circuit, on appeal,²²⁴ affirmed the District Court’s Eleventh Amendment analysis.²²⁵ The Fourth Circuit emphasized that a particular Supreme Court precedent urged by Paraguay, *Milliken v. Bradley*,²²⁶ was unavailing. In that 1977 case, federal injunctive relief was allowed for “ongoing consequences of past violations.”²²⁷ The Fourth Circuit panel in the Paraguay litigation, however, emphasized that in the *Milliken* case, the violation involved a federal school desegregation order issued against state officials who “were in violation of federal law at the precise moment when the case was filed.”²²⁸

The Supreme Court reviewed both the appeal of Breard’s individual habeas action and the appeal of Paraguay’s action on petitions for certiorari.²²⁹ The Court denied both petitions.²³⁰ As discussed earlier, the Court denied Breard’s individual habeas petition due to procedural default. Like the Fourth Circuit panel, the Supreme Court viewed the Eleventh Amendment as a dispositive bar to the grant of Paraguay’s requested relief.²³¹ The Court acknowledged Paraguay’s assertion that the *Breard* facts were “within an exemption dealing with continuing consequences of past violations of federal rights,”²³² but dismissed this argument, concluding that the “failure to notify the Paraguayan consul occurred long ago and has no continuing effect.”²³³

Accordingly, even though an injunction pursued by the detainee’s sovereign sending State might avoid the question of whether individuals can assert Article 36 rights in US courts, when such an injunction was sought in a thoroughly litigated criminal case that went all the way to the Supreme Court, the Eleventh Amendment blocked its use. In that situation, the sending State sought an injunction for a criminal case that had already been taken through final state appeal, when consular assistance was no longer being precluded. It is foreseeable that in most such scenarios, the sending State consul would also, at some post-conviction phase of the proceedings, become involved. Any similar future request by a sending State

223. *Id.*

224. *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (“We agree . . . that the violation alleged here is not an ongoing one [and] that the essential relief sought is not prospective.”).

225. The District Court also found lack of subject matter jurisdiction because “[w]ith the exception of federal habeas review, district courts do not have jurisdiction to review final decisions of a state court.” *Allen*, 949 F. Supp. at 1273. However, the Fourth Circuit panel explicitly declined to address this issue. *Allen*, 134 F.3d at 626, n.4

226. *Milliken v. Bradley*, 433 U.S. 267 (1977).

227. *Allen*, 134 F.3d at 628 (citing *Milliken*, 433 U.S. 267).

228. *Id.*

229. *Breard v. Greene*, 523 U.S. 371, 374 (1998).

230. *Id.* at 378-79.

231. *Id.* at 377-78 (“The Eleventh Amendment provides a separate reason why Paraguay’s suit might not succeed.”).

232. *Id.*

233. *Id.* The Supreme Court also added that “neither the text nor the history of the [VCCR] clearly provides a foreign nation a private right of action in United States’ [sic] courts to set aside a criminal conviction and sentence for violation of consular notification provisions.” *Id.*

for an injunction on behalf of a detainee would encounter yet another obstacle, an Eleventh Amendment Dead End in the *Medellin* Maze.

H. Escape from the Maze: A Sending State Article 36 Prospective Injunction

This article suggests a potential escape route from the *Medellin* Maze. The point of this suggestion is not to persuade actors and observers who are hostile to the interests of criminal detainees caught in the Maze that they should behave in new ways regarding these detainees. Rather, the purpose of this proposal is to offer a means of escape from the Maze that might be deployed by more sympathetic actors and observers, while still maintaining doctrinal consistency with the elements of the Maze that are already in place.

This article suggests that a sovereign state whose national has been detained by American authorities in violation of the detainee's Article 36 rights should be able to secure an injunction from a US court of applicable jurisdiction. Such an injunction (an "Article 36 Injunction") would be granted to the foreign state itself, and would apply prospectively to any of its nationals held by the authorities in that US jurisdiction. The injunction would advance the interests of the sovereign state under the VCCR, rather than the interests of the initial detainee. Indeed, the injunction would not be directed to the initial detainee at all, because any relief granted to the initial detainee would be retrospective. But after that first unlawful detention, the foreign sovereign's interests under the VCCR would be so impaired that the VCCR violation would be continuous and ongoing from the moment of its commencement. Accordingly, a prospective Article 36 Injunction should be granted at the request of any foreign sovereign sending State to secure future compliance by the US authorities regarding future detainees.

The Supreme Court's position that state procedural default rules survive direct challenge from the ICJ, and probably other international tribunals, is unlikely to be weakened. Accordingly, detainees who have asserted tardy Article 36 claims—even those on death row—may be tragically unable to escape the *Medellin* Maze. Those detainees who complain in a timely manner about Article 36 violations may also be caught at a Dead End, to the extent that Article 36 does not provide rights that can be judicially enforced by individuals. Direct enforcement by international tribunals leads to yet another Dead End, as does direct enforcement by the Executive Branch. Even a federal statute directly requiring Article 36 compliance may encounter a Dead End because of the judicial program of New Federalism. Finally, the Eleventh Amendment Dead End will often bar a foreign state from obtaining an injunction on behalf of previously detained individuals. An Article 36 Injunction, of the type herein suggested, avoids all of these pitfalls.

III. THE CONSULAR RELATIONSHIP AND THE VCCR

The purpose of the VCCR is to set up a permanent, ongoing relationship between sending and receiving States through the consular posts established by

each sending State in each receiving State. Substantial non-compliance with an important provision of the VCCR compromises and impairs that relationship. Whenever a particular party fails to comply with the VCCR, the effects of that non-compliance reduce the degree of trust experienced by the other party. This increases the probability that the other party will, in turn, fail to comply with one of its obligations in the future. At very least, the quality of the mutual consular relationship will be adversely affected by the initial non-compliance, and further consular relations of various types will be affected.

The treaty is, of course, immediately violated upon any specific incident of non-compliance. Additionally, any material violation of the VCCR triggers a situation of continuing and ongoing non-compliance because the violation substantially impairs the permanent relationship between states, which is the sole reason for the treaty's existence. In the context of Article 36 of the VCCR, this period of continuous and ongoing non-compliance survives as a matter of the total relationship between the treaty parties. Accordingly, the continuing and ongoing non-compliance persists, even if a particular sending State begins consulting with any one of its nationals detained in any particular receiving State. The consultations may address the needs of an individual detainee, but they do not ameliorate the impairment of the consular relationship.

A. The Need for Constant Cooperation and Consent

The use of the word "Relations" in the title the "Vienna Convention on Consular Relations" connotes the significance of the ongoing, continuous relationships that are being established. The Convention is focused on maintenance of the ongoing consular relationship, irrespective of (i) whether there are any diplomatic relations,²³⁴ (ii) whether the premises are owned, leased or inhabited by other means,²³⁵ or (iii) who the consular officials are at any given time.²³⁶

1. Consular Activities

Throughout the Convention there are numerous bases on which mutual consent is explicitly required between the sending and receiving States. These connections make possible the day-to-day activities of consular officials and employees. Mutual consent to various actions must be reached on a regular basis throughout the conduct of consular relations. Mutual consent is, of course, required for the establishment of consular relations.²³⁷ As an initial matter, the receiving State must consent to the location of the seat of the consular post, its classification (career or

234. VCCR, *supra* note 2, art. 2(3).

235. *Id.* art. 1(1)(j) (contemplating a variety of modes of habitation).

236. *Id.* art. 10 (contemplating changes in officials' identities).

237. *Id.* art. 2(1).

honorary), and the limits of the consular district.²³⁸ Consent also must be given for any changes to these arrangements.²³⁹

The receiving State's consent is required for a consular officer to exercise his functions outside of his consular district.²⁴⁰ More generally, the receiving State has virtually unfettered discretion in deciding whether to grant an *exequatur* to any person appointed as the head of a consular post by the sending State. Any such *exequatur* must be granted before the head of the consular post can exercise consular functions.²⁴¹

Consent of the receiving State is required for the appointment of an acting head of post if the appointee is not already a diplomatic agent or a consular officer.²⁴² A receiving State's consent is required if a consular officer is to perform diplomatic acts in the absence of a diplomatic mission in the receiving State.²⁴³ Consent of a receiving State is also required if the same person is to serve as a consular officer for two or more states.²⁴⁴

The size of the consular staff of any sending State depends, within the limits stated in the Convention, on the agreement of the receiving State.²⁴⁵ The receiving State has absolute discretion over whether a sending State may appoint consular officers who are nationals of the receiving State,²⁴⁶ and the receiving State may also reserve rights of consent for appointments of third state nationals.²⁴⁷ The capacity of a receiving State to declare a consular officer *persona non grata* is within its sole discretion, without any obligation to provide reasons.²⁴⁸ Upon severance of consular relations, the sending State may entrust the consular premises and the protection of its interests to a third state, but only if the third state is acceptable to the receiving State.²⁴⁹

2. Consular Functions

Article 5 of the VCCR consists of a long list of specific functions that consuls are expected to perform. Most of these functions cannot be adequately performed unless there is almost constant cooperation or consent from the receiving State.

In general terms, the consular function is to protect the interests of the sending State and its nationals within the receiving State.²⁵⁰ Article 5 describes certain other consular functions in general terms. Such general functions include the

238. *Id.* art. 4(2).

239. *Id.* art. 4(3).

240. *Id.* art. 6.

241. *Id.* art. 12.

242. *Id.* art. 15(2).

243. *Id.* art. 17(1).

244. *Id.* art. 18.

245. *Id.* art. 20.

246. *Id.* art. 22(2).

247. *Id.* art. 22(3).

248. *Id.* art. 23(4).

249. *Id.* art. 27(1).

250. *Id.* art. 5(a).

ascertainment “by all lawful means” of conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, and the delivery of reports thereon to the government of the sending State.²⁵¹ Another general function of Article 5 is the transmittal of judicial and other official documents, commissions and letters to the courts of the sending State in any “manner compatible with the laws and regulations of the receiving State.”²⁵²

Article 5 also is more precise in providing specific examples of particular consular functions. For example, consular staff may be expected to safeguard the interests of nationals in cases of succession *mortis causa* in the receiving State.²⁵³ Also, consular staff may be called upon to safeguard the interests of minors who are nationals of the sending State.²⁵⁴ Consular staff may exercise rights of supervision and inspection in respect of vessels having the nationality of, and aircrafts registered in, the sending State.²⁵⁵ Consular staff members may also assist such vessels and aircrafts, and their crews.²⁵⁶

3. Power of Receiving States over Consular Activities and Functions

A receiving State can substantially impair any one of the activities and functions of a sending State through a number of laws or official acts. Many such laws and acts may well not violate the terms of the VCCR, so the execution of consular activities and the fulfillment of consular functions depend on the continued and constant cooperation of the receiving State. More particularly, the ability of a sending State to fulfill its functions under the VCCR in another state can depend on the compliance witnessed by the receiving State at its own posts in the sending State. If a receiving State is not experiencing suitable treatment at one of its consulates abroad, the relationships required for the functioning of the VCCR will be jeopardized.

B. *Mandatory Duties Under the VCCR*

Many of the VCCR provisions outlined above allow one state (usually the receiving State) to exercise discretionary consent in conducting consular relations. The exercise of discretion, again by the receiving State, so as to deny consent to any proposal from the sending State, does not generate a violation of the VCCR. At the same time, the VCCR provides for many other aspects of consular relations that are mandatory. Non-compliance with one of the mandatory provisions, such as Article 36, would constitute a violation.

251. *Id.* art. 5(c).

252. *Id.* art. 5(j).

253. *Id.* art. 5(g). For example, transporting the body of a deceased national back to the sending state, or treating it in a manner consistent with the wishes of family in the sending state.

254. *Id.* art. 5(h).

255. *Id.* art. 5(k).

256. *Id.* art. 5(l).

Obviously, if a particular receiving State were to engage in a pattern or practice of violating one or more provisions of the VCCR with respect to a particular sending State, that sending State could be justifiably angry or offended. The sending State could be counted on to reciprocate through negative discretionary determinations in its capacity as a receiving State. Most of the obligatory requirements of the VCCR relate to consular privileges and immunities. There are two types of such obligatory requirements: (i) those that relate to the consular post itself, and (ii) those that relate to the officers and members of the post.

1. Privileges and Immunities Relating to the Consular Post

Article 28 requires that receiving States accord "full facilities for the performance of the functions of the consular post."²⁵⁷ Mundane, yet crucial, examples of privileges come to mind, such as access to public utilities and public services (water, electricity, sewage, and police and fire protection). But most critical to the continuous consular relationship are the essential dignitary and practical privileges of consular relations. These are of utmost value to any sending State, and their procurement and guarantee would necessarily be among the prime reasons for any state to enter into the VCCR. Such privileges include the inviolability of the consular premises,²⁵⁸ the consular archives and documents,²⁵⁹ and official consular correspondence.²⁶⁰ They also include the obligation of the receiving State to ensure freedom of movement and travel to all members of the consular post.²⁶¹ Additional examples include the obligation of the receiving State to "permit and protect freedom of communication on the part of the consular post for all official purposes,"²⁶² and the consular exemption from taxation of the consular premises.²⁶³

2. Privileges and Immunities Relating to Consular Officers and Members of the Post

Article 40 requires the receiving State to provide protection to consular officers from "any attack on their person, freedom or dignity."²⁶⁴ Consular officers may not be held liable for arrest or pre-trial detention, nor may they be imprisoned, except in the case of a grave crime.²⁶⁵ The VCCR goes on to specify that, "[i]f

257. *Id.* art. 28.

258. *Id.* art. 31.

259. *Id.* art. 33.

260. *Id.* art. 35(2).

261. *Id.* art. 34.

262. *Id.* art. 35(1).

263. *Id.* art. 32.

264. *Id.* art. 40.

265. *Id.* art. 41(1)-(2). This differs from the Vienna Convention on Diplomatic Relations ("VCDR"), which states that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." VCDR, *supra* note 41, art. 31(1).

criminal proceedings are instituted against a consular officer, he must appear before the competent authorities.” However, Article 40 then restricts the authorities’ discretion over the treatment of the officer.²⁶⁶ This is one of the few obligations on the part of sending State personnel in the VCCR.

Members of a consular post can generally be asked to give evidence, but if they refuse to do so, no coercive measure or penalty may be applied.²⁶⁷ Consular officers and employees are generally immune from the jurisdiction of judicial or administrative authorities in respect to those acts performed in the exercise of their consular functions.²⁶⁸ They are not immune, however, from civil actions arising out of contracts concluded in a personal capacity, or from civil actions by third parties for damages arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.²⁶⁹ There are additional consular immunities regarding requirements for the registration of aliens, the procurement of work permits, and the satisfaction of social security obligations.²⁷⁰

C. *Uniqueness of the VCCR and VCDR*

Every treaty entered into between or among states could be said to involve a relationship. Along these lines, one might suggest that there is nothing unusual or special about the relationships created by the VCCR. It is certainly true that most every treaty involves relationships and those relationships are of a very high value. But to simply assert the truth of that statement is to miss the point being made here. For most multilateral treaties, the primary focus and purpose of the treaty are the policy concerns that form the subject matter of the treaty, while the creation and maintenance of relationships is secondary. For example, the UN Convention on the Law of the Sea²⁷¹ has as its primary focus “the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea”;²⁷² the ICCPR²⁷³ is designed to protect political and civil rights; and the Rome Statute for the International Criminal Court sets forth the beginnings of a regime for permanent and wide-ranging international criminal law enforcement.²⁷⁴ These multilateral treaties may create relationships among State Parties, but these relationships are not the reason for existence of the treaty; policy-based strategies for protecting the sea and civil rights are their reasons for being. Even the

266. VCCR, *supra* note 2, art. 41(3).

267. *Id.* art. 44(1). This also differs from the VCDR, which provides that “[a] diplomatic agent is not obliged to give evidence as a witness.” VCDR, *supra* note 41, art. 31(2).

268. VCCR, *supra* note 2, art. 43(1).

269. *Id.* art. 43(2). The exceptions to immunity from jurisdiction for diplomats under the VCDR are more limited, relating to real property actions, succession in decedents’ estates, or professional or commercial activity outside official duties. VCDR *supra* note 41, art. 31.

270. VCCR, *supra* note 2, arts. 46–48.

271. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

272. *Id.*

273. Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

274. Rome Statute of the International Criminal Court, July 1, 2002, 37 I.L.M. 999 [hereinafter Rome Statute].

foundational UN Charter, although it certainly produces very valuable and critical relationships, is primarily concerned with setting up the modern structure of international governance, rather than with the maintenance of those relationships, *per se*.

The VCCR and the VCDR are treaties of a fundamentally different sort. These two treaties have no policy-based reason for existing. Their only real purpose is the creation and maintenance of the relationships they govern.²⁷⁵ These are the only two multilateral treaties in which this is the case. For every other multilateral treaty, the relationship is incidental to the purpose of the treaty; it is not the purpose itself. Similarly, bilateral treaties create relationships, but they are also founded on policy-based concerns. For example, the reason for extradition treaties is to assist in the execution of criminal justice in the signatory countries, and the reason for border demarcation treaties is to quiet sovereign title disputes between countries. As with multilateral treaties, the maintenance of relationships is incidental to the purpose of the treaty.

IV. CONSULAR RELATIONS AND THE ELEVENTH AMENDMENT

Obtaining an Article 36 Injunction is one way out of the *Medellin* Maze for a sovereign sending State concerned about future VCCR compliance in the US. However, injunctions against US state authorities can be difficult to obtain due to the Eleventh Amendment. This is no less the case for injunctions sought by sovereign states than it is for injunctions sought by private persons. Indeed, one of the more recent Supreme Court decisions interpreting and enforcing the Eleventh Amendment was the 1998 *Breard* decision,²⁷⁶ regarding injunctive relief sought by Paraguay against Virginia authorities.

But the limitations imposed by the *Breard* opinion should not restrict the availability of an Article 36 Injunction. The injunction that Paraguay sought in *Breard* would have protected Breard himself, as a particular criminal defendant whose conviction in state court was already final. An Article 36 Injunction, as proposed in this article, would be directed not to any particular defendant, but rather to continuous and ongoing future compliance with the VCCR regarding other detainees. Accordingly, neither *Breard* specifically, nor the Eleventh Amendment in general, is a bar to obtaining an Article 36 Injunction as herein proposed.

275. See also McGuinness, *supra* note 17, at 244 ("The consular protection function is central to smooth functioning of the international system.").

276. See generally *Breard v. Greene*, 523 U.S. 371 (1998). See *supra* Part II.G.

A. *The Breard Decision and the Eleventh Amendment*

The Supreme Court's majority opinion in *Breard* takes the form of a *per curiam* denial of petitions for certiorari and habeas corpus.²⁷⁷ It is only twelve paragraphs long. The ninth paragraph of the opinion explains the Court's approach to the Eleventh Amendment in the case. This paragraph is based on two main assertions. The Court first explains that neither the text nor the history of the Vienna Convention clearly "provides a foreign nation a private right of action in U.S. courts to set aside a criminal conviction and sentence" for a VCCR violation.²⁷⁸ This assertion was based on a concern for the finality of state judgments and clearly evinces the Court's desire to respect the "criminal conviction and sentence" of the Virginia state courts. The Court's point here is limited to disfavoring Paraguay's specific wish to "set aside" this particular sentence and conviction. The Court's assertion should not be read as having any effect on the status of the VCCR as a self-executing treaty in general, because the assertion is limited in its content to Paraguay's desire to "set aside a criminal conviction and sentence."

The second assertion sets forth the Eleventh Amendment as a bar to Paraguay's requested relief regarding its national, Breard. This holding is based on the Eleventh Amendment itself, rooted in concerns for the finality of state court judgments, rather than on any inherent limitations stemming from the text and history of the VCCR. In this assertion, the Court describes the basic concerns underlying the Eleventh Amendment and its principal effects, then observes that Virginia's "failure to notify the Paraguayan Consul occurred long ago and has no continuing effect."²⁷⁹ Accordingly, the impact of Paraguay's requested relief would have been retrospective, and not within Eleventh Amendment exceptions allowing for injunctions against "continuing consequences of past violations of federal rights."²⁸⁰ The requested relief was thus barred under the Eleventh Amendment.

Consequently, both assertions in the ninth paragraph of *Breard* regarding the Eleventh Amendment have application only with respect to actions against US states regarding detainees whose rights have already been violated under the VCCR, and in many cases whose convictions are already final. The two assertions deal with retrospective relief, not relief against violations that are continuous and ongoing. The Eleventh Amendment analysis in *Breard* thus has no necessary application to an Article 36 Injunction, which would enjoin a state's compliance in the future.

277. These are the two principal petitions that the Court denies in *Breard*. The Court also denies a motion for leave to file a bill of complaint and stay applications filed by Breard and Paraguay. *Id.* at 378-79.

278. *Breard*, 523 U.S. at 377.

279. *Id.*

280. *Id.*

B. The VCCR as a Self-Executing Treaty

Because the Supreme Court has not resolved the question, it is still technically uncertain whether the VCCR is a self-executing treaty. However, at this point, the view most supported by authority is that the VCCR is self-executing. As such, there would be no general impediment to its enforcement in US courts by other parties to the treaty. Since 2005, at least three circuits have found the VCCR to be self-executing.²⁸¹ As noted above, some US courts have held that the VCCR is not directly enforceable in US courts by private individuals; but that does not reflect on its character as a self-executing treaty.

Status as a self-executing treaty is a separate matter from status as a treaty that allows individual judicial enforcement.²⁸² The major problem in this area of the law is that courts and commentators do not always adequately distinguish between these two distinct concepts. But distinct they are, and the *Restatement (Third) of the Foreign Relations Law of the United States* (the "*Restatement*") makes this point explicitly. According to the *Restatement*, a treaty is self-executing if courts are bound to give effect to it immediately upon its coming into force, without the implementation of any domestic legislation.²⁸³ If a treaty is non-self-executing, US courts will not give it effect in the absence of legislative implementation.²⁸⁴

On the other hand, as a separate point altogether, the *Restatement* cautions that the traditional understanding is that treaties generally do not create private rights or provide for a private cause of action in US courts.²⁸⁵ This general understanding applies whether a treaty is self-executing or non-self-executing. Thus, a treaty can be self-executing, but not enforceable by individuals in US courts. In turn, finding that a treaty is not individually judicially enforceable does not preclude a finding that the treaty is self-executing. Some authorities, in blurring the distinction between self-executing status and individual judicial enforceability, lose sight of the possibility that neither self-executing status, nor a lack thereof, is conclusive on the subject of individual judicial enforceability.

The Supreme Court confirms this view in its *Medellin* majority opinion. In footnote four of its opinion, the Court reiterates the *Restatement's* provision, stating

281. *Jogi v. Voges*, 425 F.3d 367, 378 (7th Cir. 2005), *withdrawn*; *Jogi v. Voges*, 480 F.3d 822, 830 (7th Cir. 2007); *Cornejo v. County of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007); *Gandara v. Bennett*, 538 F.3d 823, 828 (11th Cir. 2008).

282. There is, of course, room for disagreement as to precisely what the phrase "self-executing treaty" means. See David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1120 n.74 (2000) (declaring that "[t]he term 'non self-executing' has multiple meanings," and collecting supporting references). However, as noted in the text above, the Supreme Court relied on the *Restatement* in its majority *Medellin* opinion for the conventional interpretation adopted in this article.

283. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.").

284. *Id.*

285. "International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts . . ." *Id.* § 907 cmt. a.

that treaties generally do not create private rights, “[e]ven when treaties are self-executing in the sense that they create federal law.”²⁸⁶ Admittedly, the Court’s discussion of self-executing status in *Medellín* has been described as suggesting confusion on the part of the Court.²⁸⁷ But this affirmation of the *Restatement*’s distinction between self-executing status and individual judicial enforceability is clear enough.

Much scholarly debate has recently focused on how to determine whether a treaty is self-executing or non-self-executing. It has been asserted that the *Medellín* opinion creates a rebuttable presumption against self-executing status,²⁸⁸ while some commentators have urged that, in fact, there should be a presumption in favor of self-executing status.²⁸⁹ The traditional view, as exemplified by the *Restatement*, has been that the intention of the US in entering into a treaty generally determines whether it is to be self-executing.²⁹⁰ Special importance is given to any statements by the President in concluding the treaty, or by the Senate in ratifying it.²⁹¹

The Supreme Court itself has explicitly declined to decide whether the VCCR is self-executing, while some federal courts have expressed the view that the VCCR is self-executing. As noted above, in the last five years, at least three majority circuit rulings have expressly held that the VCCR is self-executing. Furthermore, the District Court in Paraguay’s action in the *Breard* case noted that both “parties agree that the [VCCR is] ‘self-executing,’” and in so doing the District Court referenced the definition of “self-executing treaty,” as being “a treaty that does not require implementing legislation before becoming federal law.”²⁹² The same year, a concurring opinion in the Fourth Circuit decision for *Breard*’s

286. *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008).

287. See, e.g., John T. Parry, *A Primer on Treaties and § 1983 After Medellín v. Texas*, 13 LEWIS & CLARK L. REV. 35, 62 n.134 (2009) (“The Court’s discussion of what it means for a treaty to be self-executing exhibits confusion.”).

288. “*Medellín* tightens the test for finding a treaty self-executing.” *Id.* at 60 (stating that the Court “comes close to creating a presumption that treaties have a status similar to legislation only if the proponent of that view can prove that the language of the treaty supports such an interpretation.”); *Id.* at 60 (referencing “the Court’s apparent default position [after *Medellín*] that treaties are not self-executing”).

289. Jordan J. Paust, *Medellín, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT’L L. REV. 301, 329 (2008) (“There is a presumption that all treaties are self-executing unless a contrary intent of the creators is manifest in the terms of the treaty . . . if a treaty expressly or impliedly confers rights on individuals, it is self-executing.”); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 600, 602 (2008) (“[T]he Supremacy clause is best read to create a presumption that treaties are self-executing.”).

290. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) (“[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation.”). Cf. Paust, *supra* note 289, at 329 (“The test involves attention to the text of a treaty in light of the treaty’s context and object and purpose and can include inquiry with respect to the probable intent (express or implied) of its creators as well as in light of other international law.”).

291. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) (“If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement . . . , and of any expression by the Senate . . . in dealing with the agreement.”).

292. *Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996).

individual appeal of his conviction also determined that the VCCR was self-executing.²⁹³ Admittedly, the exact language of this concurring opinion may be an example of confusion between self-executing status and individual enforceability. However, even if it is read as such, whenever there is no federal legislation purporting to implement a treaty, a finding of individual enforceability necessarily establishes self-executing status.

Also, the US State Department declared, in a report delivered to the Senate during the ratification process for the VCCR, that the VCCR was "entirely self-executing."²⁹⁴ The State Department also stated in this report that, "[t]o the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern."²⁹⁵ Both of these quotations were justifiably emphasized by Justice Stephen Breyer in his *Medellin* dissent.²⁹⁶ In view of ratification representations by the State Department, and indications from lower court opinions, along with the Supreme Court's decision to hold the question open, the VCCR can and should be considered self-executing.

C. *Eleventh Amendment Update*

As many will recall, the text of the Eleventh Amendment, by its terms, generally excludes from the jurisdiction of federal courts any legal action against a state by a private plaintiff from outside that state.²⁹⁷ The Supreme Court has held that foreign sovereign states are among the type of plaintiffs whose actions are barred in federal court.²⁹⁸ This would seem to pose an initial stumbling block for a foreign sovereign state seeking to enforce a treaty against a US state in federal court.

However, Supreme Court interpretations have also established certain exceptions to the Eleventh Amendment's jurisdictional bar. The primary exception

293. *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) ("The Vienna Convention is a self executing treaty—it provides rights to individuals rather than merely setting out the obligations of signatories. The text emphasizes that the right of consular notice and assistance is the citizen's.") (internal citation omitted).

294. *Medellin v. Texas*, 552 U.S. 491, 556 (2008) ("[The] Convention is considered entirely self-executive and does not require any implementing or complementing legislation.") (quoting S. Exec. Rep. No. 91-9 p. 5(1969)).

295. *Id.*

296. *Id.*

297. The text of the Eleventh Amendment provides that, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 49 (7th ed. 2000) ("The Eleventh Amendment acts as a bar to federal jurisdiction over state governments, as such, when they are sued by anyone other than the federal government or another state.") (quoting *Tennessee Dep. of Human Services v. U.S. Department of Education*, 979 F.2d 1162, 1166 (6th Cir. 1992)).

298. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) ("As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State.").

is based on the early twentieth century case of *Ex Parte Young*,²⁹⁹ in which the Supreme Court held that the Eleventh Amendment would not necessarily bar a federal suit preventing a state officer from enforcing state law.³⁰⁰ In the years since its issuance, the *Ex Parte Young* exception has grown into a complex doctrine. The basic point of the later developments is that, under the exception as now interpreted, “a private person may bring an equitable action to force state officers to comply with federal law in the future.”³⁰¹ In recent years, the picture has become more involved than that. For the purposes of this analysis, the current status of the *Ex Parte Young* exception rests primarily on two Supreme Court opinions from the last quarter of the twentieth century: *Milliken v. Bradley* (“*Milliken I*”)³⁰² and *Papsan v. Allain*.³⁰³

The *Milliken v. Bradley* litigation involved a *de jure* racially segregated school system that operated in and around Detroit. Initially, in *Milliken I*,³⁰⁴ the Supreme Court invalidated a lower court remedial order that would have imposed an “inter-district” student reassignment scheme. Thereafter, in *Milliken II*, the Court validated the District Court’s second order, designed to remedy the effects of the earlier *de jure* segregation. This second order went beyond mere student reassignment within Detroit, also entailing four additional programs regarding reading, in-service teacher training, testing, and counseling. The order also required that the State of Michigan pay half the costs of these four additional programs.

In *Milliken II*, the Supreme Court sustained this payment obligation against an Eleventh Amendment attack, even though it was monetary in nature. This was notable because one of the major considerations used in interpreting certain features of the Eleventh Amendment is the desire to “prevent federal courts from issuing judgments that must be paid out of the state treasury.”³⁰⁵ In validating these payments, the Court drew a distinction between payments for retrospective compensation and payments to fund future compliance. The Court recognized that “the award of an accrued monetary liability . . . which represent[s] ‘retroactive payments’”³⁰⁶ would indeed be invalidated under the Eleventh Amendment. However, the Court in *Milliken II* indicated that the payments ordered were not such retrospective payments, but rather “a necessary consequence of compliance in

299. *Ex Parte Young*, 209 U.S. 123 (1908).

300. NOWAK & ROTUNDA, *supra* note 297, at 52.

301. *Id.* at 53.

302. *Milliken v. Bradley*, 433 U.S. 267 (1977).

303. *Papsan v. Allain*, 478 U.S. 265 (1986).

304. *Milliken v. Bradley*, 418 U.S. 717 (1974).

305. See NOWAK & ROTUNDA, *supra* note 297, at 52. John E. Nowak and Ronald D. Rotunda offer this statement as part of the explanation for why “[a]n entity that is merely the instrumentality of state government shares its immunity, but an entity that is a politically independent unit enjoys no Eleventh Amendment protection.” *Id.* They later continue: “[I]n determining whether an agency is entitled to share in the state’s Eleventh Amendment immunity, the court should determine if the state is obligated to pay any of the agency’s indebtedness. If the state has no legal obligation to bear the debts of the enterprise, then the Eleventh Amendment is not implicated.” *Id.*

306. *Milliken v. Bradley*, 433 U.S. 267, 289 (quoting *Edelman v. Jordan*, 415 U.S. 651, 663-64 (1974)).

the future with a substantive federal-question determination"³⁰⁷ The Court further described this distinction by asserting that the factual situation in *Milliken II* fit squarely within the "prospective-compliance exception" developed in earlier cases following *Ex Parte Young*.³⁰⁸ The Court then reiterated that this exception "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."³⁰⁹ The Court went on to say:

These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money [damages]. Rather, by the nature of the antecedent violation, which [caused harm to the victims, the victims] will continue to experience the [harmful] effects until such future time as the remedial programs can help dissipate the continuing effects of past misconduct.³¹⁰

The *Papasan* case concerned federal grants of land to the State of Louisiana (the "State"), which were made for the purposes of building and maintaining public schools in the northern part of the State. The State invested the land grants in the development of railroads that were destroyed during the Civil War and never rebuilt. In recompense, the State legislature started making regular payments to the affected school districts as "interest" on the notional "corpus" representing the lost lands. The petitioners considered this arrangement inadequate. In federal court, they sought, among other things, to compel "the establishment by legislative appropriation or otherwise of a fund in a suitable amount to be held in perpetual trust for the benefit of plaintiffs."³¹¹

The *Papasan* plaintiffs seem to have viewed their situation as analogous to that in *Milliken II*, on the theory that they were experiencing continuing harm resulting from past misconduct. But the Supreme Court majority disagreed:

We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners. In both cases, the trustee is required, because of the past loss of the trust corpus, to use its own resources to take the place of the corpus or the lost income from the corpus. Even if the petitioners here were seeking only the payment of an amount equal to the income from the lost corpus, such payment would be merely a substitute for the return of the trust corpus itself. That is, continuing payment of the income from the lost corpus is essentially

307. *Id.* (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (internal quotations omitted)).

308. *Id.*

309. *Id.*

310. *Id.* at 290.

311. *Papsan v. Allain*, 478 U.S. 265, 275 (1986).

equivalent in economic terms to a one-time restoration of the lost corpus itself³¹²

The Court's interpretation in this respect centered on the character of a stream of payments that were made in restitution for deleterious acts undertaken in the past by a state legislature. The Court, in essence, maintained that branding the payments a "continuing obligation" did not make them any less of a liability for a past breach. In the Court's view, the fact that the breach occurred in the past was crucial, and the payments were thus viewed as retroactive.

In the wake of Supreme Court cases such as *Milliken II* and *Papasan*, it is possible to discern a two-part test for determining when facts of the type they involved allow for relief consistent with the Eleventh Amendment. The Fourth Circuit panel in *Paraguay v. Allen* laid out this test succinctly: "[F]ederal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective."³¹³

As noted earlier, the Supreme Court, after *Milliken* and *Papasan*, and as part of its disposition of the *Breard* litigation, addressed Eleventh Amendment issues in one paragraph of its short *per curiam* opinion in *Breard*. The Court's application of the Eleventh Amendment precedents to the facts in *Breard* was so brief as to be cursory. The Court merely cited *Milliken II*, and said that the *Milliken* precedent did not apply to the *Breard* facts since "[t]he failure to notify the Paraguayan Consul occurred long ago and has no continuing effect."³¹⁴ The Court seems to have meant that the violation of federal law was no longer continuing, as the Court had viewed the asserted violation in *Papasan* as no longer continuing. The Court's curt concluding observation on the issue was that, "[t]he causal link present in *Milliken II* is absent in this suit," apparently meaning that the reason for the harm in *Breard* was not continuously linked to then present facts.³¹⁵

In any event, the two-part formulation stated by the Fourth Circuit panel in *Paraguay v. Allen* seems like the most accurate and succinct analytical test to use in evaluating this type of claim under the Eleventh Amendment at the present time.

D. The Article 36 Injunction and the Eleventh Amendment

If any national of a sending State is detained in the US and is convicted without Article 36 compliance, the failure to observe the VCCR results in an abrogation of the treaty. The VCCR, as a self-executing treaty ratified according to

312. *Id.* at 281.

313. *Paraguay v. Allen*, 134 F3d 622, 627 (4th Cir. 1998).

314. *Breard v. Greene*, 523 U.S. 371, 377-78 (1998).

315. *Id.* at 378.

constitutionally adequate procedures, is binding federal law.³¹⁶ Accordingly, its abrogation is a violation of federal law.³¹⁷

As this article has shown, any noncompliance with Article 36 notice and information requirements creates an ongoing and continuous breach of the consular relationship defined in the VCCR. Because the sole focus and purpose of the VCCR is the establishment and maintenance of that relationship, its ongoing and continuous breach is, effectively, an ongoing and continuous breach of the treaty itself.

This article has also suggested that a sending State whose national has been denied Article 36 protection can sue for an injunction to secure prospective compliance by state authorities in that state.³¹⁸ With this Article 36 Injunction, a federal court could order state authorities, in all future dealings with detainees who are nationals of the sending State, to observe the Article 36 notice and information requirements. The Injunction addresses the ongoing and continuous breach of the VCCR, but would not apply to treatment of detainees that occurred in the past. It relates to a concrete, palpable worsening of the consular relationship clearly caused by the initial breach and conviction.

The violation caused by an initial detention and conviction of a national from the sending State causes the ongoing and continuous breach of the VCCR, and that breach causes harm to the sending State. That harm is like the continuous harm experienced by the petitioners in *Milliken II* because the VCCR relationship continues unabated after noncompliance, just as the harm from the establishment of segregated schools continued unabated after their establishment. The Injunction itself is also prospective in character, since it is directed solely at the cessation of

316. In the academic literature after *Medellin*, there has been some discussion regarding the extent to which non-self-executing treaties can legitimately be considered the "Supreme Law of the Land." E.g., Curtis A. Bradley, *Internet, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 548 (2008) ("[T]he [Medellin majority] opinion leaves unclear . . . whether a non-self-executing treaty is simply judicially unenforceable, or whether it more broadly lacks the status of domestic law."). There is much less cause for such misgivings, however, with respect to a self-executing treaty, such as the VCCR. At the very least, self-executing treaties are judicially enforceable, and as such are readily perceived to occupy the status as federal law.

317. It has generally been asserted that "the Supremacy Clause arguably creates an implied right of action to enjoin enforcement of state laws that are preempted by treaties." Sloss, *supra* note 282, at 1152. This approach suggests that the *Ex Parte Young* exception to the Eleventh Amendment is broadly applicable for all claims against US states for treaty violations. This is an intriguing approach, and this article does not intend to detract from it. However, this article makes the more limited point that an Article 36 violation, when made the subject of an Article 36 Injunction of the type herein suggested, would normally satisfy the continuing violation and prospective relief requirements that have generally applied even when the *Ex Parte Young* exemption is applicable. Those federal cases allowing the *Ex Parte Young* exemption for treaty claims have still retained these requirements. E.g., *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997), *aff'd on other grounds*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (concluding that the Eleventh Amendment does not bar the residual treaty claims at issue because they sought "prospective injunctive relief against state officials in their official capacities for continuing violations of the Bands' federal treaty rights").

318. See Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697, 700 (1998) ("There is no present reason why foreign states should not be able voluntarily to submit their treaty claims for adjudication by U.S. courts.").

an ongoing violation, rather than the individual circumstances of any person already convicted.³¹⁹

The Article 36 Injunction does not assist any person already convicted of an Article 36 violation and, due to Eleventh Amendment considerations, it could not. This feature does not, however, rob the Injunction of its utility. The sending State for the foreign detainee is the real party in interest whenever Article 36 is violated. The sending State is the counterparty of the US under the VCCR, whose consular relationship has been abrogated as a result of noncompliance with the Article 36 requirements. Although the position of any detainee from any sending State convicted without compliance with Article 36 is unfortunate, a large part of the harm caused by such noncompliance relates to the prospects of future detainees. The Article 36 Injunction directly addresses this harm.

The US, both through its President and its Supreme Court, has recognized that noncompliance with the Article 36 notice and information requirements violates an international treaty obligation. Given that the President and the Supreme Court have both openly declared that a failure to adhere to Article 36 requirements results in a breach of international law, it is especially appropriate to provide for meaningful Article 36 relief.

CONCLUSION

Constitutional doctrines, lower court opinions, and Supreme Court opinions, most recently the Supreme Court opinion in *Medellín v. Texas*, have greatly impaired the enforceability of VCCR Article 36 in the US. They have created a confusing and nearly impenetrable maze for any party in the US seeking to enforce Article 36 protections: the *Medellín Maze*.

Prisoners who have been convicted after state authorities have not complied with Article 36 have been precluded from complaining about the violations because of state procedural default rules. The Supreme Court has upheld such state procedural rules against attack by international tribunals. Lower courts have maintained that, even if a detainee were to complain in a timely fashion, thus avoiding procedural default, Article 36 does not allow individuals to obtain judicial relief in US courts. The Supreme Court clearly believes that judgments by multilateral international tribunals cannot be imposed upon US courts to secure Article 36 compliance. Existing separation of powers doctrine prevents the Executive Branch from directly ordering such compliance in US courts, and may well also prevent Congress from requiring compliance at the state level. Furthermore, the Eleventh Amendment prevents individuals from seeking injunctions against criminal proceedings in violation of Article 36. The *Medellín Maze* is intricate and seemingly impregnable. This intricacy and apparent impenetrability does a serious disservice to the US in the current international legal

319. Cf. *Edelman v. Jordan*, 415 U.S. 651 (1974) (invalidating a lower court order for payment of past due assistance checks, but upholding the order to the extent that it required disbursement of payments prospectively due).

environment. It is now especially important, in the international arena and at home, for the US to stand for the rule of law. The three opinions of the Supreme Court in recent years addressing Article 36 have consistently resulted in a failure of its enforcement in the US. The *Medellin* Maze poses a significant problem with respect to the current relationship between the US and international law.

This article has acknowledged that the enforcement of Article 36 in US courts will involve serious domestic legal and constitutional issues. It is indeed legitimate to take these issues—involving separation of powers, federalism, and the character of a common law adversarial legal system—into account. Accordingly, this article has offered an “escape route” from the *Medellin* Maze that is narrowly crafted and has a specifically defined scope. The Article 36 Injunction proposed herein would enforce Article 36 notice and information requirements for a sending State’s future detainees, once authorities in a US state have convicted a national of that sending State in violation of Article 36. Such an injunction would meaningfully address the interests of the sending State that have been impaired by the Article 36 violation, while still observing the strictures imposed by concerns for separation of powers, federalism, the character of the common law adversary system of justice, and the finality of judgments.

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